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FIRST DEAN OF THE SCHOOL

By his Wife and Daughter

A. M. BOARDMAN and ELLEN D. WILLIAMS

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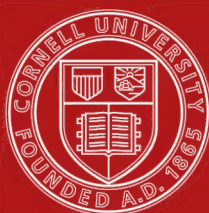
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A practical treatise on the law of trust



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A
PRACTICAL TREATISE
ON
THE LAW OF TRUSTS.

BY
(THE LATE)
THOMAS LEWIN, ESQ.

From the Eighth English Edition.

BY
FREDERICK ALBERT LEWIN,
OF LINCOLN'S INN, ESQUIRE, BARRISTER-AT-LAW, AND LATE FELLOW
OF CAIUS COLLEGE, CAMBRIDGE.

WITH AMERICAN NOTES

ALSO A SUPPLEMENTARY CHAPTER ON

TRUSTS FOR ACCUMULATION.

By WILLIAM C. SCOTT, Esq.,
OF THE PHILADELPHIA BAR.

VOLUME II.

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* CHAPTER XVII. [* 385]

DUTIES OF TRUSTEES FOR RAISING PORTIONS.

THE subject of portions is of so extensive a character, that to exhaust it would require a treatise by itself. All that can be attempted in a single chapter is a brief summary of the law upon the points of most usual occurrence in practice.

We propose in the *first* section to inform trustees Who are *who* are their *cestuis que trust*, or in other words who *who* are to be regarded as portionists—a question that appears simple enough in itself, and yet involves a multitude of cases which can only be reconciled by the most refined distinctions. The principal struggle has been where and under what circumstances an *eldest* son is to be included amongst or excluded from the designated class. But further, the question *who* are portionists, involves the inquiry when or at what time portions, which are regulated by peculiar principles, are vested; and again, even if portions may have become vested, it remains to be asked whether they may not have become divested on the doctrines of ademption and satisfaction—doctrines which open a wide field of controversy, and are to some extent left still in an unsatisfactory state.

In the *second* section we shall explain (and this may Amount to be compressed within much narrower bonds) what is the be raised. *amount* to be raised, both as regards the principal sum and interest, and also as to costs; [and also in what cases maintenance will be allowed, even though the corpus be not vested.]

In the *third* section we shall have to consider at *what* When to be *time* the portions ought to be raised, and more par- raised. ticularly when portions are charged on *reversionary* interests, for then either the estate must suffer by raising the portions at a sacrifice in *præsenti* out of an interest to take effect in future, or else the portionists must be left destitute until the reversion falls into possession.

* Lastly, in the *fourth* section we shall offer [* 386] Mode of some practical remarks as to the best *mode* of raising raising. the portions, as whether by sale or mortgage, or a fall of timber, or out of mines, or in what other manner.

SECTION I.

WHO ARE TO BE REGARDED AS PORTIONISTS.

UNDER this head we shall inquire: *First.* Who are meant by younger children where the estate charged is settled on an "eldest" child. *Secondly.* Who are meant by younger children where the estate charged is not settled on an "eldest" child. *Thirdly.* At what time the portions vest. *Fourthly.* Of ademption and satisfaction.

Settlement
on eldest
son.

First. Who are meant by younger children where the estate charged is settled on an "eldest" child.

1. "The Court in the case of portions," observed Sir G. Turner, "seems to have regarded rather the *purpose* than the *words* of the instrument. In some of the cases, indeed, the Court seems almost to have carried into effect the purpose of the instrument in opposition to the words, and although in the late cases more weight has been given to the terms of the instrument, there can be no doubt that in cases of this nature, very great attention must be given to the purpose of the instrument" (a).

General rule.

2. In the first place, then, let us see in what cases an eldest child actually will be regarded as a younger child constructively, or, (which is the same thing), in what cases a younger child will be deemed the eldest child.

"Every child," said Lord Hardwicke, "except the *heir*," (i. e. except the one who takes the estate) "is considered in equity as a younger, and eldership, not carrying the estate along with it, is considered not such an eldership as shall exclude," viz. from sharing in the portions provided for younger children. "It would be hard, that the right of eldership should be taken away, and yet not have the benefit of a younger child" (b).

Time of dis-
tribution.

3. If, therefore, before the period fixed for *distribution of the portions*, the estate shifts either by the [*387] original limitations or by * appointment under a power contained in the settlement from the eldest child to a younger child, the younger child so taking the estate is treated as the eldest (c), and the eldest child losing the estate is deemed a younger child (b).

(a) *Remnant v. Hood*, 2 De G. F. & J. 413; approved by V. C. Wood, *Davies v. Huguenin*, 1 H. & M. 743.

(b) *Duke v. Doidge*, 2 Ves. sen. 203, note.

(c) *Davies v. Huguenin*, 1 H. & M. 730; *Re Bayley's Settlement*, 9 L. R. Eq. 491; *Teynham v. Webb*, 2 Ves. sen. 198; *Stan-*

Thus, in the leading case of *Chadwick v. Doleman* (e), Chadwick v. a father on his marriage settled an estate to the use of Doleman. himself for life with remainder (subject to a jointure) to the use of trustees (upon trust within six months after his decease to raise 4000*l.* for younger children's portions as the father should appoint, or in default of appointment to be divided amongst the younger children), with remainder to the use of the first and other sons in tail. There were several children of the marriage, viz. *Humphrey* the eldest, and *Thomas, John, Lewis, Ann, and Dorothy*. By a deed, dated in 1686, the father appointed the 4,000*l.*, giving 2,600*l.* part thereof to Thomas the *second* son on the occasion of his marriage, and after this Humphrey the eldest son died in his father's lifetime without issue, and thereupon the father appointed the 2,600*l.* amongst his younger children other than Thomas. On the death of the father the estate devolved on the second son Thomas, and then the question arose whether the first or the second appointment was good, or in other words whether Thomas was entitled to the 2,600*l.* as well as the estate. The Lord Keeper said he admitted that Thomas at the time of the appointment was a person capable of taking, and was a younger child within the power, but that this was a defeasible appointment, not from any power of revoking, or upon the words of the appointment, but from the capacity of the person. He was capable of taking at the time of the appointment made, but that was *sub modo* and upon a tacit or implied condition, that he should not afterwards happen to become the eldest son and heir, so that he had as it were only a defeasible capacity. And it was, therefore, adjudged that Thomas, who took the estate, was not also entitled to the 2,600*l.*

4. In this case the second son by succeeding to the estate and so becoming the eldest was deprived of any share in the portion for * younger children [*388] and no claim appears to have been put forward on behalf of Humphrey the eldest son to stand in the place

Eldest son taking place of younger son.

hope v. Collingwood, 4 L. R. Eq. 286; S. C. nom. Collingwood v. Stanhope, 4 L. R. H. L. 43; Broadmead v. Wood, 1 B. C. C. 77; Savage v. Carroll, 1 B. & B. 265; Simpson v. Frew, 5 Ir. Ch. Rep. 517; [Reid v. Hoare, 26 Ch. D. 363;] Jermyn v. Fellows, For. 93, was a case of special circumstances. In Leake v. Leake, 10 Ves. 477, the doctrine of Chadwick v. Doleman, 2 Vern. 528, would seem to have been applicable, though it was not applied. The question was not discussed.

(e) 2 Vern. 528.

of a younger son. But it has since been settled that under such circumstances the eldest son, even though he died in his father's lifetime, and sustained up to his own decease the character of eldest son, but never eventually came into possession of the estate, is entitled to be treated as a younger son, and to share with the other portionists. Thus in *Davies v. Huguenin* (*f*), the estate was settled on J. Davies and his wife successively for life, remainder to the children as he should appoint, and subject as aforesaid to the use of a trustee for 500 years for raising portions for younger children; remainder to the first and other sons in tail. J. Davies had two sons, William the elder, and John Stanley the younger. William attained twenty-one and died in his father's lifetime, [and it was held that his personal representative thereupon became entitled to a portion, but subject to the exercise of the power of appointment.] Again, in *Ellison v. Thomas* (*g*) the eldest son of R. E. C. was not tenant in tail but tenant for life only, with remainder to his first and other sons in tail; and yet it was held that the personal representative of this eldest son who died without issue male before coming into possession of the estate, was entitled to share in the portions provided for the younger children of R. E. C.

[If the estate is sold for payment of charges, and it is insufficient for payment of all the charges, so that the eldest son gets nothing under the limitation to him, he must still be treated as an eldest child taking the estate subject to the charges, and is not entitled to share in the portions provided for the younger children (*h*).]

Eldest
daughter a
younger
child.

5. If an estate be settled on the first and other sons with a provision for younger children, an *eldest daughter* though the firstborn, is regarded as a *younger child* (*i*). So, if an estate be settled on the first and other sons of A. with remainder to B., and there is a trust for raising portions for A.'s younger children, and A. has two *daughters* only, so that the estate shifts over to B., both the daughters of A. are younger children, and entitled to share the portions between them (*j*).

(*f*) 1 H. & M. 730. See *Broadmead v. Wood*, 1 B. C. C. 77; but see *Re Bayley's Settlement*, 9 L. R. Eq. 491.

(*g*) 1 De G. J. & S. 18; 2 Dr. & Sm. 111; and see *Collingwood v. Stanhope*, 4 L. R. H. L. 55; but see *Gray v. Earl of Limerick*, 2 De G. & Sm. 371.

(*h*) *Reid v. Hoare*, 26 Ch. D. 363.]

(*i*) *Beale v. Beale*, 1 P. W. 245, *per Cur.*

(*j*) *Beale v. Beale*, 1 P. W. 244; and see *Butler v. Duncomb*, 1 P. W. 448; *Hall v. Luckup*, 4 Sim. 5; *Emery v. England*, 3 Ves. 232.

*6. The rule that a younger son who at the [*389] time of distribution takes the estate and so becomes the eldest son, is excluded from sharing in the portions, must be qualified by the condition that he takes the estate under the same settlement, or under some settlement incorporated into the portions' settlement, for otherwise he retains his rights as a younger son. Thus an estate was settled to the use of A. for life, with remainder (subject to A.'s wife's annuity) to the use of his first and other sons in tail, with a trust for raising portions on the death of the wife for younger children, to be vested at twenty-one or marriage. A. had two sons, Henry the eldest, and George, and after the death of A. in 1842, but during the lifetime of A.'s widow, and therefore before the portions were raisable, Henry barred the entail and devised the estate to his brother George; and it was held that on the death of A.'s widow in 1857, when the portions became raisable, George was entitled to share in the portions, though he was then the eldest son and was the owner of the estate, because he derived his title to it, not as eldest son under the settlement, but as devisee of his brother (*k*).

7. But if at the time of distribution the eldest son *has not* the estate, but except for his own act (as in joining with his father in defeating the entail and resettling the property) he *would have had* the estate he is not allowed to plead the want of the estate and to claim as a portionist (*l*).

8. The doctrine of portions as laid down in *Chadwick v. Doleman* has been said to apply only where the settlor is the parent or stands *loco parentis*; but if this proposition were accepted literally, then if a testator devised an estate to A. a perfect stranger for life, with remainder to his first and other sons in tail, and created a term in the same estate for raising portions for the younger children of A., the second son of A., though, by the death of his elder brother without issue in A.'s lifetime, he succeeded to the estate, would also be entitled to share in the portions. Upon examination of the several authorities it will be found that at the most there are only a few dicta in support of the

Eldest son
may be a
younger son.

Eldest son
parting with
the estate.

Whether the
rule applies
only to
parents or
persons
loco parentis.

(*k*) *Adams v. Beck*, 25 Beav. 648; *Sandeman v. Mackenzie*, 1 J. & H. 613; *Sing v. Leslie*, 10 Jur. N.S. 794; *Macoubrey v. Jones*, 2 K. & J. 685; *Spencer v. Spencer*, 8 Sim. 87; *Wandesforde v. Carrick*, 5 I. R. Eq. 486; [*Domvile v. Winnington*, 26 Ch. D. 382;] *Peacocke v. Pares*, 2 Keen. 689, must be considered as overruled.

(*l*) *Stanhope v. Collingwood*, 4 L. R. Eq. 286; *Collingwood v. Stanhope*, 4 L. R. H. L. 43.

proposition suggested (*m*). Lord Hardwicke on

(*m*) Thus, in *Hall v. Hewer*, Amb. 203, a testator devised his real estate to John Hewer for life, remainder to John's first and other sons in tail, remainder to his daughters in tail, remainder to Humphrey, second son of T. Hall, in fee. And the testator charged his estate with 6000*l.* in trust for the younger children of T. Hall, in case J. Hewer died without leaving issue. James the eldest son of T. Hall, died in the lifetime of J. Hewer, so that on the death of the latter, Humphrey was the eldest son of T. Hall. It was held upon the construction of the will, that the 6000*l.* was contingent until the death of J. Hewer, and then vested in such persons as were then the younger children of T. Hall, and as Humphrey was *then* the eldest he took nothing. This was the ground of the decision, and therefore the question did not arise whether if Humphrey had previously acquired a vested interest, he could have lost it by becoming the eldest son. Under no circumstances, however, could he have become disentitled, for there was no shifting of the estate, which had never been given to James the eldest son, but to Humphrey himself. The testator meant the estate and the portion to go together. The Court observed "There was no case where the Court had considered a younger child as an eldest, but between parent and children, or those who stood in *loco parentis*." But this was merely a dictum.

In *Matthews v. Paul*, 3 Sw. 328 (and see *Adams v. Adams*, 25 Beav. 652; *Adams v. Robarts*, Ib. 658), a testatrix bequeathed her Imperial annuities and five per cent. stock in trust, upon the termination of the Imperial annuities (which event occurred in May, 1819) for the children of her daughter Mary Paul, except an eldest son. Mary Paul had at the testatrix's death five children, viz. two sons, John and Walter, and three daughters. John died before the termination of the annuities, so that on the occurrence of the latter event Walter was the eldest son, and the question was, whether he was to share in the portions and it was ruled that he was not, for that as the time of distribution was the period for ascertaining who were to be *included* in the class, it must equally be the period for ascertaining who were to be *excluded*. Here there was no real estate in settlement at all, and therefore the principle of *Chadwick v. Doleman* did not come into question. The Court, however, during the argument, observed, "The cases where this rule has been adopted have arisen on gifts by *parents* or persons in *loco parentis*. In general the estate passing to the eldest son has been in the power of the persons making the provision for the younger children, and the same instrument has comprised the estate and the provision. Has the rule ever been applied to portions given by a stranger, who merely contemplated the chance of property descending to the eldest son, as representative of the family?"

In *Lincoln v. Pelham*, 10 Ves. 166, (and see *Bowles v. Bowles*, Ib. 177) the circumstances were somewhat similar. Lady Pelham gave a residuary fund in trust for Frances Pelham for life, and after her death for the younger children of the testatrix's late daughter, Catherine, Duchess of Newcastle. At the date of the will there were three children living of Catherine, viz. Lord Lincoln, Thomas, and John. Lord Lincoln died in the testatrix's lifetime, and Thomas contended that as he was a younger child at the date of the will, though not at the death of the testatrix, he was entitled to a share. Lord Eldon disallowed the claim, and considered that the general description of younger

* the other hand not only applied the doc- [* 390]
trine of *Chadwick v. Doleman* to the case, where a grand-

children was not equivalent to naming the younger children living at the date of the will, but meant younger children for the time being, and added, that "whatever was the principle as to parents or persons *in loco parentis*, it had no application here, for though the grandmother was executing a purpose, which as to this kind of doctrine might be considered *parental*, (the purpose of providing for the younger branches, of other persons certainly, but in a sense her family), yet she thought that her daughters were sufficiently provided for, so as to make it unnecessary to consider them objects of her care," 10 Ves. 174. Here, again, there was no dispute as to the effect of the shifting of any estate, but it was simply a question of construction, who were the persons meant by the description of younger children.

In *Scarisbrick v. Lord Skelmersdale*, 4 Y. & C. 116, Justice Maule said, "It is to be observed that it is only in cases of provision made by parents or persons standing *loco parentis*, that courts of equity give this forced construction to the word 'younger.' In cases of gifts by strangers courts of equity, as well as courts of law, construe the word according to its literal import, as laid down by Lord Hardwicke in *Hall v. Hewan*. The distinction is founded on the consideration, that in the one case the party giving or settling is regarded as doing an act which he was under a moral, though not a legal obligation to perform, whereas in the case of a gift by a mere stranger, no such obligation exists," &c.

In *Sandeman v. Mackenzie*, 1 J. & H. 613, Mrs. Chisholm, a widow with three children (Alexander, the eldest—who was in possession of the Chisholm estates, subject to his mother's jointure—Duncan, and Jemima), married Sir Thomas Ramsay, and by the settlement made on the marriage, Sir T. Ramsay settled 10,000*l.* upon himself and wife successively for life, with remainder to the then present children of Mrs. Chisholm (except Alexander) equally at twenty-one; and if none of such younger children of Mrs. Chisholm should attain twenty-one, then in trust for Alexander. Sir T. Ramsay died in 1830, and Lady Ramsay in 1859; Alexander died in his mother's lifetime in 1838, and therefore Duncan came into possession of the Chisholm estates. All the three children attained twenty-one. The question was whether Duncan, though he had succeeded to the Chisholm estates, was entitled to share in the 10,000*l.* portions, and it was held that he was entitled, and Sir W. P. Wood in delivering judgment, made some important observations. "I should have been glad," he said, "if the doctrine had been confined to the class of cases in which it originated, where a settlor by marriage settlement makes provision for his family generally, limiting the estate to the eldest son in tail, giving the usual powers for jointures and portions (though, even when this is not done, the son might still make any provision he pleased on attaining his majority), and then going on to charge the settled estate in favour of younger children. In such cases it is reasonable enough to regard the limitations for younger children as intended for the benefit not merely of those who happened to be younger children at the time of vesting, but of those who might fill that character when the fund should come into possession. A settlor under such circumstances may fairly be presumed to provide for the whole of his family, and younger children would in such an instrument naturally be taken to mean those who should not

[* 391] *mother* having a power over the settled * estate, appointed portions to her younger grandchildren (*n*); but he also applied it where the settlor was an *uncle*, and this not because he considered the uncle as [* 392] standing *loco parentis*, but on general * principles (*o*). "Where," he said, "a provision is made by a *father* either by will or settlement for younger children, an elder unprovided for shall be deemed a younger, and the ground is that every branch of the family should be provided for, the Court not considering the words elder or younger. The question then is, whether there exists any difference where the settlement is made by a father's brother to a *collateral* relation, a nephew," &c., and he laid it down broadly that "every child except the *heir* is considered a younger, and that *eldership* which does not carry the *estate* along with it is not such an *eldership* as will exclude from sharing in the portions." From this judgment may be inferred the principle that where the settlor (whether a parent, or standing in *loco parentis*, or a *stranger*) settles an estate upon a particular family, and means to provide for all the family by limiting the estate to one and portions to the others, there no one of them shall under the same settlement take the estate and a portion also, but in such cases the Court will, if necessary, disregard the strictly literal meaning of the words eldest and younger, and carry out the substantial intention.

General rule. 9. This point however remains to be settled, and the

otherwise be provided for. But the moment you extend the doctrine to other cases where the provision for younger children is made by some person *in loco parentis*, not by marriage settlement, but by some independent deed, you have an extremely different case to deal with. When the rule is laid down thus broadly, it includes cases where the effect of it may be to render it impossible, for a second son marrying in his father's lifetime, to make any jointure or settlement, except on a contingency. Still the cases, to whatever extent they may go, have not been carried beyond those where the donor is, if not a parent, at any rate *in loco parentis*. No authority goes so far as to apply the rule to a person, not a relative of those for whom provision is made, and not having any interest in the family estate. But here Sir Thomas Ramsay had nothing to do with the family or the estate." The substantial ground for the Court's decision in this case was that the younger child (who was declared entitled to the portions though he also took the estate) did not take the estate by any title derived from the persons who created the portions. And see *Cooper v. Cooper*, 8 L. R. Ch. App. 813.

(*n*) Lord Teynham *v. Webb*, 2 Ves. sen. 198; as to a grandfather standing *loco parentis*, see *Farrer v. Barker*, 9 Hare, 737; *Swallow v. Binns*, 1 K. & J. 417.

(*o*) *Duke v. Doidge*, 2 Ves. sen. 203, note.

only general rule to be laid down at present is that where the settlor is the parent or stands *loco parentis*, and portions are provided for younger children, and the estate upon which the portions are charged devolves (before the time for distribution of the portions) on one of the children, under the same settlement or under a settlement incorporated into it (*p*), there the words "eldest child" and "younger children" are capable of what has been called "a prodigious latitude of construction," viz., an eldest may be treated as a younger, and a younger as an eldest; but that where portions are provided for younger children, and the estate either does not devolve before the time of distribution of the portions on any of the children, or does not so devolve under the settlement creating the charge or a settlement incorporated in it by recital or otherwise, there the words "eldest child" and "younger children" receive their ordinary and natural interpretation.

Secondly. Who are meant by younger children where the estate charged is not settled on an "eldest" son.

1. We now proceed to the cases where a settlor provides portions for younger children generally, without the ingredient that one is * to take the estate [* 393] and the others to have the charge. Here the ordinary rules of construction apply, and "eldest" is taken to mean the eldest actually, and "younger" to mean the younger actually (*q*), and the time for ascertaining who is eldest and who are younger is not the period of *distribution* but the period of *vesting*. Where no one is made an eldest son.

Thus in *Adams v. Adams* (*r*) Sir W. Curtis, the father of Emma Adams, bequeathed 6,000*l.* to trustees in trust for Emma Adams for life, and after her decease "in trust for the children born or to be born of Emma Adams, who not being an eldest or only son for the time being," should as to sons attain twenty-one, or as to daughters attain twenty-one or marry, in equal shares. Emma Adams died in 1857, and there were eight children. Henry William the eldest attained the age of twenty-one in 1826, and died in 1854, in the lifetime of his mother. George the second son attained twenty-one in 1828, and at the death of his

(*p*) See *Stanhope v. Collingwood*, 4 L. R. Eq. 286; *Collingwood v. Stanhope*, 4 L. R. H. L. 43.

[(*q*) *Domville v. Winnington*, 26 Ch. D. 382.]

(*r*) 25 Beav. 652; *Matthews v. Paul*, 3 Sw. 328; *Lyddon v. Ellison*, 19 Beav. 565; [*Domville v. Winnington*, 26 Ch. D. 382; *Longfield v. Bantry*, 15 L. R. Ir. 101.] But see *Re Rivers' Settlement*, 40 L. J. N. S. Ch. 87.

mother was the eldest son. The question was whether the words "eldest son" meant eldest at the time of the first portion vesting, or eldest at the time of its falling into possession; that is, whether George was or not entitled to a share. The M. R. adopted the principle laid down by Sir T. Plumer, viz., that there cannot be two periods, one for ascertaining who compose the class to take, and the other for ascertaining who are to be excluded (s), and that as George was not the eldest son when he attained twenty-one, he took a vested interest, and that the interest being once vested there was nothing to divest it, except to a limited extent by the attainment of vested interest by the other younger children.

Exceptions.

2. To the general rule that the eldest son in these cases is to be ascertained not at the time of *distribution* but at the time of *vesting*, there may be exceptions as in *Livesey v. Livesey* (t), with reference to which the M.R. observed, "a testator may say 'I do not intend any child to take a share unless at the period of distribution he shall fulfil the condition of not being an eldest son.' In *Livesey v. Livesey* the class was to be ascertained when the youngest child attained twenty-one, and there was a direction that the son who was or should become an eldest son should not take anything under the devise or bequest, and consequently the person who filled the character of eldest son at that period could not take. Unless the testator has said, 'I [* 394] do not intend a person * to take any interest who at the time of *distribution* fills the character of eldest son,' I think the character of eldest son is to be ascertained when the interest becomes vested" (u).

Thirdly. At what time the portions vest.

General rule, as to vesting.

1. In every well drawn settlement whether by deed or will, the period of vesting is clearly expressed upon the face of the instrument itself, and the usual period is as to sons at twenty-one, and as to daughters at twenty-one or marriage, with a declaration that the portions are not to be payable until after the death of the tenants for life, unless with the consent of the tenants for life. It often happens, however, that the language of the instrument is contradictory or inconsistent, or in some way ambiguous, and in order not to defeat the probable intention a peculiar and important canon of construction has been established; and it is this—

(s) *Matthews v. Paul*, 3 Sw. 328.

(t) 13 Sim. 33; 2 H. L. Ca. 419.

(u) 25 Beav. 656.

Where a parent or a person standing *loco parentis* provides portions for children, the strong presumption is that he means to provide portions for all such children as may live to require it, *i. e.* for sons who attain twenty-one, and daughters who attain twenty-one or marry. If, therefore, the language of the instrument be uncertain but is capable of the construction, that sons at twenty-one, and daughters at twenty-one or marriage, shall take a vested interest, the Court will so decide it by force of the presumption.

Thus, in *Hougrave v. Cartier (v)* a fund was vested in trustees upon trust for Peter for life, subject to 200*l.* pin-money to Elizabeth his intended wife, and if Elizabeth should die before Peter, "without leaving any child or children, or leaving such they should all die under twenty-one," then to pay any sum not exceeding 3,000*l.* as Elizabeth should appoint. But in case Elizabeth survived Peter then in trust for Elizabeth for life, and after the decease of the survivor in case there should happen to be any child or children of their two bodies *living*, who should attain twenty-one, then in trust for such child or children attaining twenty-one as Elizabeth should appoint, or in default as Peter should appoint, and in default among such children equally. Peter died leaving Elizabeth his widow and two children, John and Mary. Elizabeth appointed the fund between John and Mary, and then John having attained twenty-one died in the lifetime of his mother, and then Elizabeth died leaving Mary her only child. The question was whether Mary, the only child who survived her mother, was not absolutely entitled to the whole fund, to the exclusion of John who had died in her lifetime. Sir W. Grant observed, "If the settlement clearly * and unequivocally makes the right of a child [* 395] to a provision depend upon its surviving both or either of the parents, a Court of Equity has no authority to control that disposition. If the settlement is incorrectly or ambiguously expressed, if it contains conflicting and contradictory clauses, so as to leave in a degree uncertain the period at which, or the contingency upon which, the shares are to vest, the Court leans strongly towards the construction which gives a vested interest to the child, when that child stands in need of a provision, usually as to sons at the age of twenty-one, and as to daughters at that age or marriage." And after commenting upon the various clauses contained in the settlement he came

to the conclusion that John was entitled to the share appointed to him.

So in *Swallow v. Binns* (*w*), Nathaniel Binns made a voluntary settlement by which a trust fund was limited to himself for life, with remainder to his son George Binns for life, and after his decease in trust "for all and every of the children of the said George Binns, *which might be living at the time of his decease*," to be equally divided, and the shares of sons to vest at twenty-one and of daughters at twenty-one or marriage. Had the settlement stopped there those children only who survived George would have taken, but then followed other inconsistent limitations, namely, If *any* child being a son died under twenty-one, or being a daughter died under twenty-one unmarried, the share of such child was to survive to the other or others; "and in case all such of the children of the said George Binns as were sons should die under twenty-one, and all such of them as were daughters under that age without having been married," then the trust fund was to be held in trust for other persons. Nathaniel died in 1822 and George in 1851, having had six children, all of whom attained twenty-one, but two of them died in his lifetime, and the question was whether such two were entitled to share with the four who survived George. Vice-Chancellor Wood observed, "The rule applies not only to settlements but also to the case of a will, so far as it provides for children towards whom the testator places himself in *loco parentis*. In this case the grandfather is providing for his children and grandchildren in such a manner, as throughout to place himself, with regard to the grandchildren, in the position of one who is performing a father's part, and providing what are expressly stated to be portions in one part of the settlement, and what, without that expression, would, I apprehend, be regarded as portions for his several grandchildren. The canon of construction to which I [* 396] have * referred may be thus stated: That whereas in the case of ordinary instruments an express estate thereby limited cannot be enlarged, except by necessary inference, yet, upon instruments of this description, there is an implication of law arising upon the instrument itself, subject of course to any expressions to the contrary, that it is the intention of any person who places himself in *loco parentis* to provide portions for children or grandchildren, as the case may

(*w*) 1 K. & J. 417.

be, at the period when those portions will be wanted, namely, upon their attaining the age of twenty-one years, or (as is usually provided in the case of daughters) upon their attaining twenty-one or marriage; and that such portions shall then vest whether the children do or do not survive their parents. It is thought to be an unnatural supposition that the circumstance of such children or grandchildren predeceasing their parents, should have been contemplated as depriving them of the whole of the portion intended for their benefit. What the Court has said is this, that you do not require a *necessary* implication to arrive at the conclusion, that all children, who being sons attain twenty-one, or being daughters attain that age or marry, were intended to take, irrespectively of the question whether they survive their parents or not, and that if you find upon the face of the settlement a clause which renders it *doubtful* whether it was intended that all such children should take, or that those only should take who might survive their parents, the Court leans strongly in favour of the previous supposition, namely, that the probable intention of a person making a settlement would be in favour of the vesting at such fixed period, independently of the question of survivorship. On the other hand the rule is not one of arbitrary construction; the Court does not go out of its way by a forced construction to raise this implication; it must find an implication upon the natural and plain construction of the words in the settlement." And the Vice-Chancellor, applying these principles to the case before him, came to the conclusion that the two children who predeceased George their father were entitled to shares. The general principles laid down in the two foregoing examples have been approved and acted upon in numerous other cases (*x*); [and the rule applies as well to portions created by will as to those created by deed (*y*).]

* 2. But strong as the presumption is in favour [* 397] of portions vesting in children at an age when they require it, yet if the language of the instrument be clear and unambiguous, that the vesting of portions in sons who attain twenty-one or in daughters who attain

(*x*) *Emperor v. Rolfe*, 1 Ves. sen. 208; *Powis v. Burdett*, 9 Ves. 428; *Remnant v. Hood*, 27 Beav. 74; *Perfect v. Curzon*, 5 Mad. 442; *Torres v. Franco*, 1 R. & M. 649; *Woodcock v. Dorset*, 3 B. C. C. 569; *Hope v. Lord Clifden*, 6 Ves. 499; *Bythesea v. Bythesea*, 23 L. J. N. S. Ch. 1004; *In Re Goddard's Trusts*, 5 I. R. Eq. 14; [*Wakefield v. Richardson*, 13 L. R. Ir. 17.]

(*y*) *Jackson v. Dover*, 2 H. & M. 209; *Re Knowles*, 21 Ch. D. 806.]

twenty-one or marry is to depend on some contingency, as the event of their surviving their parents, the Court cannot contradict the written instrument (z).

Where
portional
fund has to
be created.

3. A distinction must also be made between those cases where the portional fund exists or is to be raised at all events, so that the question relates only to the distribution of the fund, and those cases where the fund itself is to be called into existence upon a contingency, so that the latter contingency leavens all the portions and makes them all contingent.

Thus in *Hotchkin v. Humfrey* (a) a term of 500 years was created in trust that "in case the husband should leave one or more younger children that should be living at the decease of the survivor of the husband and wife," the trustees were to raise portions for "such younger children," the same to be paid to daughters at the age of eighteen or marriage, and to sons at twenty-one; and should there be no such son or daughter then the term to cease. There were four children of the marriage who attained twenty-one, but two only survived both parents. Was the portional fund to be divided between the four or given to the two who survived? Sir T. Plumer said, "If the children who died before the surviving parent are to be considered as having taken vested interests, it must follow that a vested interest was given on a contingency. Can that be? When a fund is contingent the shares to be paid out of it must be contingent. If all the children had died before the surviving parent, the fund would not have been raisable, and therefore till such parent's death it was uncertain and contingent whether it could be raised. The intention appears to me, therefore, to have been to provide only for such children as should survive the surviving parent."

Where vest-
ing not
provided for
by the settle-
ment.

4. Where the settlement is silent as to the vesting of the portions, the Court has to fall back upon general principles, and *Remnant v. Hood* (b) is an important [* 398] case upon this head. A testator devised * his estate to Samuel Thorold for life, with remainder to his

(z) *Re Wollaston's Settlement*, 27 Beav. 642; *Jeffery v. Jeffery*, 17 Sim. 26; *Bradley v. Powell*, Cas. t. Talb. 193, but doubted by Lord Hardwicke, in *Tunstal v. Bracken*, 1 B. C. C. 124, note; *Fitzgerald v. Field*, 1 Russ. 430; *Bright v. Rowe*, 3 M. & K. 316; *Skipper v. King*, 12 Beav. 29; *Whatford v. Moore*, 7 Sim. 574; *Farrer v. Barker*, 9 Hare, 737; and see *Worsley v. Granville*, 2 Ves. sen. 333.

(a) 2 Mad. 65; and see *Swallow v. Binns*, 1 K. & J. 426; *Fitzgerald v. Field*, 1 Russ. 430.

(b) 2 De G. F. & J. 396.

first and other sons successively in tail, with remainder to his first and other daughters successively in tail, and enabled the tenant for life to charge 2,000*l.* for the portions of his younger children. S. Thorold accordingly upon his marriage charged 2,000*l.* to be raised within three months from his decease in favour of his younger children, but gave no directions as to the time of vesting. There was issue of the marriage a son and six daughters; the son died an infant in the father's lifetime, so that on the death of the father the eldest daughter became tenant in tail in possession. Two others of the daughters died infants in their father's lifetime, and the three remaining daughters married and attained twenty-one and two of them survived the father, but the other died in his lifetime. It was conceded by the counsel that the infants who died in the father's lifetime would take nothing, though L. J. Knight Bruce entertained a doubt (c). But as to the one who attained twenty-one and died in the father's lifetime, it was contended that the portion as a charge upon land had by the death of the portionist before the time for raising it sunk for the benefit of the estate. It was ruled, however, to the contrary, and the deceased child who had attained twenty-one and married was held entitled to participate. Lord Justice Turner, who applied himself to the points raised with his usual care, observed, "There are three periods at which the portions may have been intended to vest; the period of the birth of the children, the period at which they would require their portions (which, according to the ordinary habit in such cases as evidenced by the usual course of settlement, would be at twenty-one, or as to the daughters on marriage), and the period of the death of the parents. Looking both to the language and to the purpose of this instrument, I see nothing which in any way imports that the portions were not intended to vest during the lives of the parents, and to adopt the period of the death as the time of vesting would be to deprive the provision of that certainty which it must, I think, fairly be taken to have been the object of the settlement to secure. It would render the interests of the children contingent upon their surviving their parents, and deprive them of the means of making any certain provisions for their families during the whole of their parents' lives. This is a result against which the Court has struggled and successfully struggled in many cases,

(c) See 2 De G. F. & J. 403.

and I think therefore that we should not be justified in adopting this period as the time of vesting, in the ab-
[*399] sence of anything on the face of the *instru-
ment indicating that it was so intended. Between the
other two periods it is not as I have said necessary for
us to decide, but I think it right to state that I lean to
the opinion, that in this particular case the true period
of vesting was at twenty-one, or as to the daughters on
marriage. The consequence of holding the portions to
vest at the birth would be that the shares of children
dying in early infancy would go to the parent, thus con-
travening the purpose of the settlement, by giving to
the father what was intended for the children, and
the Court in these cases seems to have regarded rather
the purpose than the words of the settlement" (d).

General rule.

5. Upon the authority of these and other cases it
may be considered as established, that unless there be
something special in the instrument (e), the portions
of the younger children, whether they survive the ten-
ant for life or not, will not vest in sons unless they
attain twenty-one, or in daughters unless they attain
twenty-one or marry (f); and that the shares of sons
who attain twenty-one and of daughters who attain
twenty-one or marry, will vest absolutely, so as not to
be divested by subsequent death in the lifetime of the
tenant for life (g).

Vesting of
portions.

6. Where portions are expressly made to vest in sons
at twenty-one, and in daughters at twenty-one or mar-
riage, if any son or daughter die before that period the
share sinks into the estate (h), even though the instru-
ment direct the interest on the portion to be applied
during minority towards that child's maintenance (i).

Where rais-
able out of
rents.

7. Several cases, however, seem to have made good
the exception that where no time is named in the set-
tlement for vesting, and the portions are to be raised,
not out of the *corpus*, but of the annual *rents* and

(d) The whole of the judgment well deserves a perusal.

(e) See *Earl Rivers v. Earl Derby*, 2 Vern. 72.

(f) *Bruen v. Bruen*, 2 Vern. 439; S. C. Pr. Ch. 195; *Edge-
worth v. Edgeworth*, Beat. 328; *Warr v. Warr*, Pr. Ch. 213;
Hinchinbroke v. Seymour, 1 B. C. C. 395; *Teynham v. Webb*, 2
Ves. sen. 209; *Davies v. Huguenin*, 1 H. & M. 730, see 743;
[*Henty v. Wrey*, 19 Ch. D. 492;] and see *Evelyn v. Evelyn*, 2 P.
W. 659, and the cases there cited; *Tunstal v. Bracken*, 1 B. C. C.
124, note; *Mayhew v. Middleditch*, 1 B. C. C. 162.

(g) *Davies v. Huguenin*, 1 H. & M. 730; *Macoubrey v. Jones*, 2
K. & J. 684.

(h) *Jennings v. Looks*, 2 P. W. 276; *Boycot v. Cotton*, 1 Atk.
552.

(i) *Hubert v. Parsons*, 2 Ves. sen. 261.

profits, and the rents and profits have begun to be available for the purpose, then the portionist takes a vested interest, though he dies in infancy (*j*). The portion must, as a whole, be either vested or not vested, and cannot be intermittent, * and therefore as [* 400] the trust to raise the portion has commenced it must go on.

[8. The question arose in the recent case of *Henty v. Wrey* (*k*), whether a power to appoint portions could be so exercised as to vest portions absolutely in children of tender years, and *Kay, J.*, relying on *Lord Hinchinbroke v. Seymour* as reported by *Brown* (*l*), held that it could not, but that such an appointment would be so improper that the Court would control it by refusing to allow the portions to be raised if the children did not live to want them. But this view was overruled on appeal, when the late *M.R.*, after careful consideration of the case of *Lord Hinchinbroke v. Seymour*, came to the conclusion that it was really decided on the ground of fraud on the power, and was no authority in support of the view that the power could not be exercised in favour of infants; and *Lindley, L.J.*, laid down the following rules as the result of his examination of the authorities (*m*):—

“1. That powers to appoint portions charged on land ought, if their language is doubtful, to be construed so as not to authorize appointments vesting those portions in the appointees before they want them—that is, before they attain twenty-one, or (if daughters) marry.

2. That where the language of the power is clear and unambiguous, effect must be given to it.

3. That where upon the true construction of the power and the appointment the portion has not vested in the lifetime of the appointee, the portion is not raisable, but sinks into the inheritance.

4. That where upon the true construction of both instruments the portion has vested in the appointee, the portion is raisable, even although the appointee dies under twenty-one, or (if a daughter) unmarried.

5. That appointments vesting portions charged on land in children of tender years, who die soon afterwards, are looked at with suspicion; and very little ad-

(*j*) *Evelyn v. Evelyn*, 2 P. W. 659; *Cowper v. Scott*, 3 P. W. 119; *Earl of Rivers v. Earl of Derby*, 2 Vern. 72.

[(*k*) 19 Ch. D. 492; 21 Ch. D. 332.]

[(*l*) 1 B. C. C. 395.]

[(*m*) 21 Ch. D. 359.]

ditional evidence of improper motive or object will induce the Court to set aside the appointment or treat it as invalid, but that without some additional evidence the Court cannot do so.”]

Fourthly. Of Ademption and Satisfaction. The question who are portionists involves the doctrine of Ademption and Satisfaction, and we propose briefly to state the leading principles.

Ademption
and satisfac-
tion.

[* 401] *1. The nature of Ademption and Satisfaction may be best illustrated by instances. A father by his will bequeaths 1,000*l.* to a daughter, and after the date of the will he settles 1,000*l.* upon the same daughter upon the occasion of her marriage, and dies without having altered his will. Here the father, owing a debt of nature to his daughter (*n*), had originally intended to satisfy the obligation by a bequest in his will, but before the will takes effect the marriage occurs, and he makes the like provision for her by act *inter vivos*. In such a case the Court presumes that the father did not mean to bestow *two* portions upon the daughter at the expense perhaps of his other children, but to substitute the one portion for the other. Equity therefore holds that the subsequent (*o*) advance is an *ademption* of the legacy. “Where,” said Lord Eldon, “a parent or person standing *loco parentis* gives a legacy as a portion, and afterwards, upon marriage or any other occasion calling for it, makes an advance in the nature of a portion to the child, that will amount to an *ademption* of the gift by the will, and this Court will presume he meant to satisfy the one by the other” (*p*). Ademption, therefore, is where the will precedes, and the settlement follows.

If, again, a father by act *inter vivos* covenants to settle 1,000*l.* on the marriage of his daughter, and afterwards either by act *inter vivos* (*q*) or by will gives 1,000*l.* to the same daughter, here the Court leaning against double portions precludes the daughter (in the absence of evidence to the contrary) from taking both the marriage portion and also the subsequent gift or legacy, and puts her to her election which one of the

(*n*) See *Watson v. Earl of Lincoln*, Amb. 326; *Pym v. Lockyer*, 5 M. & Cr. 34; *Powel v. Cleaver*, 2 B. C. C. 516; *Cooper v. Cooper*, 8 L. R. Ch. App. 813.

(*o*) A gift prior to the will is no ademption, unless it be specially contracted for, see *Taylor v. Cartwright*, 14 L. R. Eq. 176.

(*p*) *Trimmer v. Bayne*, 7 Ves. 515.

(*q*) *Jesson v. Jesson*, 2 Vern. 255; *Thomas v. Kemey*, 2 Vern. 348; *Keays v. Gilmore*, 8 J. R. Eq. 290.

two she will prefer (*r*). *Satisfaction* therefore, is where the settlement precedes and the gift or legacy follows. It might have been wise, as observed V. C. Wood, if the rule had never been applied where the settlement is anterior to the gift or will, as the testator or donor might well be said to know what had been previously done (*s*). But the law is established otherwise, and in general terms Satisfaction may be defined to be the donation of a thing with the intention that it is to be taken * either wholly or in part, in extinction of some prior (legal) claim of the donee (*t*).

2. The doctrine of Ademption and Satisfaction applies only as between parents (whether father or mother) (*u*), or persons *loco parentis* on the one hand, and children on the other. The doctrine does not hold as between strangers (*v*), or as between husband and wife (*w*), or as between brothers, or as between grandfather and grandchild, or as between uncle and nephew, or as between any other relatives than as above. But a brother may by his conduct place himself *loco parentis* to a brother (*x*), and a grandfather (*y*), uncle (*z*), or other relative or connection as a stepfather (*a*), may place himself *loco parentis* to a grandchild, nephew, or other relative or connection; and this though the person *loco parentis* has children of his own (*b*), and though the actual father be living and the child be resident with him and is maintained by him (*c*). So

Persons *loco parentis*.

(*r*) Copley v. Copley, 1 P. W. 147; Papillon v. Papillon, 11 Sim. 642; Warren v. Warren, 1 B. C. C. 305, &c.; Byde v. Byde, 2 Eden, 19; Sparkes v. Cator, 3 Ves. 530, &c.; Hinchcliffe v. Hinchcliffe, 3 Ves. 516; Weall v. Rice, 2 R. & M. 251; Bruen v. Bruen, 2 Vern. 439.

(*s*) Dawson v. Dawson, 4 L. R. Eq. 513; per V. C. Wood.

(*t*) Chichester v. Coventry, 2 L. R. H. L., 95 per Lord Romilly.

(*u*) Finch v. Finch, 1 Ves. jun. 534.

(*v*) Powel v. Cleaver, 2 B. C. C. 499. But even as between strangers "if a legacy appears on the face of the will to be bequeathed for a particular purpose, and a subsequent gift appears by proper evidence to have been made for the same purpose, a presumption is made *prima facie* in favour of ademption," per Lord Selborne, L. C., *Re Pollock*, 28 Ch. D. 552, 556.

(*w*) Richardson v. Elphinstone, 2 Ves. jun. 463; Haynes v. Mico, 1 B. C. C. 129; Couch v. Stratton, 4 Ves. 391.

(*x*) Monck v. Monck, 1 B. & B. 298.

(*y*) Powys v. Mansfield, 3 M. & Cr. 359; 6 Sim. 528; Campbell v. Campbell, 1 L. R. Eq. 383; Pym v. Lockyer, 5 M. & Cr. 29; and see Roome v. Roome, 3 Atk. 183.

(*z*) Shudal v. Jekyll, 2 Atk. 516.

(*a*) Curtin v. Evans, 9 I. R. Eq. 553.

(*b*) Monck v. Monck, 1 B. & B. 298.

(*c*) Powys v. Mansfield, 3 M. & Cr. 359 (see 368), reversing S. C. 6 Sim. 528; Pym v. Lockyer, 5 M. & Cr. 29; Shudal v. Jekyll, 2 Atk. 518.

a *putative* father is not in law the parent of the illegitimate child (*d*), but he may place himself *loco parentis* by a course of conduct. And Lord Thurlow, in speaking of a parent's provision for a child, observed generally, "as to its being considered as the payment of a debt, the law does not compel the parent to give the legacy; the Court can only mean a moral obligation, a laudable affection which may exist in *others* besides a *parent* (*e*).

How persons
constituted
loco parentis.

3. By what acts a person will place himself *loco parentis* is a question upon which parol evidence is admissible (*f*), and is often in practice a question of extreme difficulty (*g*). According to Sir W. Grant, "A person *loco parentis* is one who assumes the parental character or discharges parental duties" (*h*). Sir L. Shadwell said, "The legal sense of the term is that the party has so acted towards the children, as that he has thereby imposed upon himself a moral obligation to provide for them" (*i*) and [* 403] Lord Eldon speaks of him *as "a person *meaning* to put himself *loco parentis*, in the situation of the person described as the lawful father of the child" (*j*); and Lord Cottenham attached a great force in this description to the word "*meaning*," as referring to the *intention* rather than the *act* of the party (*k*), and added, that the definition was to be considered as applicable not to all the parental offices and duties (for they were infinitely various) but to such offices and duties as related to the making provision for a child (*l*). If a person has contributed to the maintenance of a female relative from the time of her father's death, and has been treated as one whose consent was necessary upon her marriage, and has taken upon himself the obligation of making a provision for her upon marriage, he must under such circumstances be regarded as having placed himself *loco parentis* (*m*).

Presump-
tion.

4. Ademption and Satisfaction are both *Presumptions* only—that is, where there is no intrinsic evidence

(*d*) *Ex parte* Pye, 18 Ves. 140; *Grave v. Earl of Salisbury*, 1 B. C. C. 425; *Wetherby v. Dixon*, 19 Ves. 412, *per Cur.*; *Smith v. Strong*, 4 B. C. C. 493; *Jeacock v. Falkener*, 1 B. C. C. 295.

(*e*) *Powel v. Cleaver*, 2 B. C. C. 516.

(*f*) *Powys v. Mansfield*, 6 Sim. 528; 3 M. & Cr. 359.

(*g*) See *Fowkes v. Pascoe*, 10 L. R. Ch. App. 350.

(*h*) *Wetherby v. Dixon*, 19 Ves. 412.

(*i*) *Powys v. Mansfield*, 6 Sim. 556.

(*j*) *Ex parte* Pye, 18 Ves. 154.

(*k*) *Powys v. Mansfield*, 3 M. & Cr. 367.

(*l*) *Ib.*

(*m*) *Booker v. Allen*, 2 R. & M. 270; *Pym v. Lockyer*, 5 M. & Cr. 29.

one way or another, the Court *presumes* that double portions were not meant. But if the Court collects from the *written instrument* that double portions were intended, no presumption arises, and therefore parol evidence cannot be let in to contradict the written instrument (*n*). Where there is no *intrinsic* evidence to the contrary the presumption arises, and then this presumption, like any other, may be rebutted by *extrinsic* or *parol* evidence, and of course counter evidence may be given to support and fortify the original presumption (*o*). There is no doubt that sometimes this presumption of law defeats the real intention, but as a general rule it effectuates the intention, and were it not for the doctrine under consideration, the provisions for families would often be most unjust, and the farthest from the settlor's actual wishes (*p*).

* 5. Ademption and Satisfaction are held to [* 404] Subjects apply only where the properties which are the subject must be of the two gifts are *ejusdem generis*. A legacy of money *ejusdem generis* will not be adeemed by a subsequent settlement of land; and a covenant to settle specific lands will not be satisfied by a subsequent settlement of money (*q*). A bequest of 10,000*l.* was not adeemed by a subsequent settlement of a beneficial lease (*r*), and a legacy of 500*l.* was not adeemed by a subsequent gift of stock in trade

(*n*) Hall v. Hill, 1 Dr. & W. 94; 1 Conn. & Laws, 120, in which all the previous cases are reviewed.

(*o*) Such is the result of the numerous authorities. The principal cases are Kirk v. Eddowes, 3 Hare, 509; Booker v. Allen, 2 R. & M. 270; Lloyd v. Harvey, Ib. 310; Weall v. Rice, 2 R. & M. 251; Dawson v. Dawson, 4 L. R. Eq. 511, *per* V. C. Wood; Trimmer v. Bayne, 7 Ves. 508; Rosewell v. Bennet, 3 Atk. 77; Powys v. Mansfield, 3 M. & Cr. 374, 378, *per* Lord Cottenham; Monck v. Lord Monck, 1 B. & B. 298; Hartopp v. Hartopp, 17 Ves. 184; Ellison v. Cookson, 1 Ves. jun. 100; Robinson v. Whitley, 9 Ves. 577; Pole v. Lord Somers, 6 Ves. 309; Wallace v. Pomfret, 11 Ves. 542; Thellusson v. Woodford, 4 Mad. 420; Bell v. Coleman, 5 Mad. 22; Biggleston v. Grubb, 2 Atk. 48; Hoskins v. Hoskins, Pr. Ch. 263; Chapman v. Salt, 2 Vern. 646; Shudal v. Jekyll, 2 Atk. 516; Hale v. Acton, 2 Ch. Rep. 35; Cooper v. Cooper, 8 L. R. Ch. App. 819; Curtin v. Evans, 9 I. R. Eq. 553; [Tussaud v. Tassaud, 9 Ch. D. 363;] *Re* Pollock, 28 Ch. D. 552.

(*p*) Montefiore v. Guedalla, 1 De G. F. & J. 103, *per* L. J. Turner.

(*q*) Bellasis v. Uthwatt, 1 Atk. 428, *per* Cur.; Bengough v. Walker, 15 Ves. 512, *per* Cur.; Chichester v. Coventry, 2 L. R. H. L. 96, *per* Cur.; and see Barret v. Beckford, 1 Ves. sen. 520; Masters v. Masters, 1 P. W. 423; Cooper v. Cooper, 8 L. R. Ch. App. 819; [Lewis v. Lewis, 11 I. R. Eq. 340.]

(*r*) Grave v. Lord Salisbury, 1 Bro. C. C. 425.

upon the father's taking the son into partnership (*s*). But where a father covenanted upon the marriage of his son to pay 2,000*l.* by way of portion, and afterwards by his will bequeathed to his son certain powder works *and so much money* as when added to the powder works would make up the sum of 10,000*l.*, the amount in money required to make up the sum of 10,000*l.* was in fact an ordinary legacy, and was therefore applied in satisfaction of the marriage portion (*t*). [So where a father gave a bond for the payment of a sum of 10,000*l.* to his reputed son on a future day, and shortly before the day of payment took the son into partnership with him, and the articles provided that 19,000*l.* of the capital brought in by the father should belong to the son, it was held that the bond was satisfied (*u*).]

Intention
expressed.

6. A legacy will not be adeemed by a subsequent advance if the latter be *expressed* to be in satisfaction of some other and quite different claim, as in satisfaction of a legacy under the will of a former testator (*v*), or if the subsequent advance be for a particular purpose, as to buy furniture (*w*).

Legacies and
advances.

7. Legacies to a child are always regarded as *portions* unless it be otherwise expressed (*x*), and so are all advances *inter vivos* by a parent to a child unless the instrument itself show (as sometimes happens) that the second gift was *alio intuitu* and not meant as a portion (*y*).

Advance of
less amount.

8. Where the subsequent advance is of *less* amount [* 405] than the * previous legacy, it was for some time doubtful what would be the effect—whether the advance would adeem the *whole* legacy (*z*), or whether the doctrine of ademption would be excluded altogether, or whether it would be an ademption *pro tanto* or to the extent of the advance. It has now been settled that under such circumstances the subsequent advance will

(*s*) *Holmes v. Holmes*, 1 Bro. C. C. 555; [see *Re Lawes*, 20 Ch. D. 81.]

(*t*) *Bengough v. Walker*, 15 Ves. 507.

[(*u*) *Re Lawes*, 20 Ch. D. 81.]

(*v*) *Baugh v. Reed*, 3 B. C. C. 192.

(*w*) *Robinson v. Whitley*, 9 Ves. 577.

(*x*) *Ex parte Pye*, 18 Ves. 151, *per* Lord Eldon; *Shudall v. Jekyll*, 2 Atk. 518, *per* Lord Hardwicke; *Pym v. Lockyer*, 5 M. & Cr. 35; *Ellison v. Cookson*, 1 Ves. jun. 107, *per* Lord Thurlow; *Leighton v. Leighton*, 18 L. R. Eq. 458.

(*y*) *Baugh v. Reed*, 3 B. C. C. 192; *Monck v. Monck*, 1 B. & B. 298; *Leighton v. Leighton*, 18 L. R. Eq. 458.

(*z*) *Hartop v. Whitmore*, 1 P. W. 681; *Ex parte Pye*, 18 Ves. 151; *Platt v. Platt*, 3 Sim. 512.

be an ademption *pro tanto*, so that the child can claim only the balance of the legacy (a).

9. A share of a testator's *residuary estate* is regarded Residue. as a legacy to the amount of the share, and therefore if a testator bequeaths his residuary estate amongst his children and afterwards makes an advance in favour of a child, such advance, if it equal or exceed the amount of the share, will be an ademption of the whole share, and, if it be of less amount, will be an *ademption* of that child's share of the residue *pro tanto* (b). So if a parent make a provision for a child in his lifetime and afterwards bequeaths a residue to the same child, the amount of the residue will be an absolute or partial *satisfaction* to the amount of the residue (c).

10. It has been argued that where a testator gives a Codicil. legacy to a child and then makes an advance, and then by a codicil *republishes* the will, the original legacy shall be restored. But the Court has held the true construction of the codicil to be that the will is to have the effect which it would have had if the codicil had not been made except as altered by the codicil, and that as the double provision would not have taken place, had the codicil not been made, it will not be set up by the codicil (d).

11. As a child's portion is commonly settled upon Husband and issue. the child for life with remainder to the *issue*, with a limitation in the case of a daughter to her *husband* for life, the Court regards the limitations to the issue, and in the case of a daughter the limitation of the life estate to the husband as parts of the provision for the child, so that not only the life estate of the child, but also the interests of the * children and hus- [* 406]

(a) *Pym v. Lockyer*, 5 M. & Cr. 29; *Kirk v. Eddowes*, 3 Hare, 509; *Ex parte Pye*, 18 Ves. 151, *per* Lord Eldon; *Montefiore v. Guedalla*, 1 De G. F. & J. 100, *per* Campbell, C.; *Re Pollock*, 28 Ch. D. 552. [If a father stands in the position of a mere debtor to his child, advances by him of sums less than the amount of the indebtedness are not *pro tanto* a satisfaction of the debt; *Reade v. Reade*, 9 L. R. Ir. 409.]

(b) *Dawson v. Dawson*, 4 L. R. Eq. 504; *Montefiore v. Guedalla*, 1 De G. F. & J. 93; *Stevenson v. Masson*, 17 L. R. Ex. 78; and see *Smith v. Strong*, 4 B. C. C. 493; *Freemantle v. Bankes*, 5 Ves. 79; *Smyth v. Johnston*, 31 L. T. N. S. 876.

(c) *Thynne v. Glengall*, 2 H. L. Ca. 131; *Earl of Glengall v. Barnard*, 1 Keen, 769; *Montefiore v. Guedalla*, 1 De G. F. & J. 103, *per* L. J. Turner; *Rickman v. Morgan*, 2 B. C. C. 394.

(d) *Booker v. Allen*, 2 R. & M. 270, see 300; *Lloyd v. Harvey*, *Ib.* 310; *Monck v. Monck*, 1 B. & B. 298; and see *Roome v. Roome*, 3 Atk. 181.

band are brought into the account as parts of the advance to the child (e).

If a father covenant to settle on his daughter and her children and then makes a bequest to her *children*, this is a satisfaction of the covenant as regards the children of the daughter (f). [So where under the father's covenant the children of a daughter became entitled as tenants in common, and the father gave legacies to one of the children of the daughter, and to two children of a deceased child of the daughter, it was held that the legacies were *pro tanto* a satisfaction of the covenant as to the interests of the legatees (g).] But if a father upon the marriage of his son covenant to settle a fund upon him and his wife and children, and in consideration thereof the *father of the wife* makes a settlement at the same time, and then the father of the son bequeaths a share of his estate to the son, the legacy to the son though a satisfaction of the son's interest under the father's settlement, is not a satisfaction of the interest of the son's *children* (h).

Slight differences.

12. The Court from its leaning against double portions will not allow *slight differences* in the limitations to rebut the presumption, and by slight differences are meant such as, in the opinion of the judge, leave the two provisions substantially of the same nature (i). The cases upon the subject have generally arisen with reference to *ademption* (j); but the rule applies also to *satisfaction* (k). In the case of a *debt* (as distinct from

(e) *Kirk v. Eddowes*, 3 Hare, 509. Read the important observations of V. C. p. 521; *Platt v. Platt*, 3 Sim. 503; and see *Campbell v. Campbell*, 1 L. R. Eq. 383; *Russell v. St. Aubyn*, 2 Ch. D. 398; *Romaine v. Onslow*, 24 W. R. 899.

(f) *Campbell v. Campbell*, 1 L. R. Eq. 383; [*Bennett v. Houldsworth*, 6 Ch. D. 671.]

[(g) *Bennett v. Houldsworth*, 6 Ch. D. 671.]

(h) *McCarogher v. Whieldon*, 3 L. R. Eq. 236.

(i) *Weall v. Rice*, 2 R. & M. 268, *per* Sir J. Leach; [*Tussaud v. Tussaud*, 9 Ch. D. 363.]

(j) *Earl of Durham v. Wharton*, 3 Cl. & Fin. 146; 3 M. & K. 472; 5 Sim. 297; *Twisden v. Twisden*, 9 Ves. 427, *per* Lord Eldon; *Trimmer v. Bayne*, 7 Ves. 515, *per* Lord Eldon; cited with approbation, *Powys v. Mansfield*, 6 Sim. 561; *Powys v. Mansfield*, 3 M. & Cr. 374, *per* Lord Cottenham; *Weall v. Rice*, 2 R. & M. 251; *Platt v. Platt*, 3 Sim. 503; *Monck v. Lord Monck*, 1 B. & B. 304, *per Cur.*; *Lloyd v. Harvey*, 2 R. & M. 310; *Sheffield v. Coventry*, 2 R. & M. 317; *Hartopp v. Hartopp*, 17 Ves. 184; *Stevenson v. Maeson*, 17 L. R. Eq. 78; [*Edgeworth v. Johnston*, 11 I. R. Eq. 326.]

(k) *Clark v. Sewell*, 3 Atk. 98, *per* Lord Hardwicke; *Thynne v. Glengall*, 2 H. L. Ca. 131; *Campbell v. Campbell*, 1 L. R. Eq. 383; *Sparkes v. Cator*, 3 Ves. 530; *Russell v. St. Aubyn*, 2 Ch.

a portion) said Lord Cottenham, small circumstances of difference between the debt and the legacy are held to negative the presumption of satisfaction (*l*), but in the * case of *portions* small circumstances are dis- [* 407] regarded. Thus it is, that a smaller legacy is not held to be in satisfaction of part of a larger *debt*, but it may be satisfaction *pro tanto* of a *portion* (*m*). However, the differences in the limitations may be so great as to negative the presumption of satisfaction in case even of portions (*n*). If a father covenant on the marriage of his daughter to pay a sum by way of portion, and then by his will bequeaths to her a share of his residuary estate, but by the same will gives directions for payment of his debts, the presumption of *satisfaction* is negatived by the direction for payment of debts, and then the portion is raised as a debt, while the daughter is also allowed to claim a share of the residue (*o*). But if a testator direct payment of his debts and gives a share of his residuary estate to a daughter and then makes an advance to her upon her marriage, the presumption of *ademption* is not negatived by the direction for payment of debts in the previous will (*p*). Where a father is a debtor, not morally, but actually to his child, as for money advanced by the child or on any other account, a bequest by the father to the child is no satisfaction, where it would not be a satisfaction as between the father and a stranger (*q*), but what would be a satisfaction as between strangers, will also be a satisfaction as between father and child (*r*).

13. A *contingent* legacy bequeathed by a father will not be a satisfaction of a *vested* interest in the child under a previous settlement (*s*). Contingent legacy.

14. A *stranger* may indirectly derive advantage from the doctrine of *ademption*, as where a testator gives a legacy to the child, and the residue to strangers, and Strangers may be benefited.

D. 398; *Romaine v. Onslow*, 24 W. R. 899; [*Mayd v. Field*, 3 Ch. D. 587;] and see *Hartopp v. Hartopp*, 17 Ves. 191.

[(*l*) See also *Re Dowse*, 50 L. J. N. S. Ch. 285.]

(*m*) *Thynne v. Glengall*, 2 H. L. Ca. 131.

(*n*) *Coventry v. Chichester*, 2 De G. J. & S. 336; 2 L. R. H. L. 71; 2 H. & M. 149; [*Tussaud v. Tussaud*, 9 Ch. D. 363.]

(*o*) *Chichester v. Coventry*, 2 L. R. H. L. 71; 2 De G. J. & S. 336; 2 H. & M. 149; *Lethbridge v. Thurlow*, 15 Beav. 334; *Paget v. Grenfell*, 6 L. R. Eq. 7; *Alleyn v. Alleyn*, 2 Ves. sen. 37.

(*p*) *Dawson v. Dawson*, 4 L. R. Eq. 504.

(*q*) *Tolson v. Collins*, 4 Ves. 483; *Fairer v. Park*, 3 Ch. D. 309.

(*r*) *Edmunds v. Low*, 3 K. & J. 318.

(*s*) *Bellasis v. Uthwatt*, 1 Atk. 426 *Hanbury v. Hanbury*, 2 B. C. C. 352; *Chichester v. Coventry*, 2 L. R. H. L. 96, *per Lord Romilly*.

then in his lifetime advances the child beyond the amount of the legacy. Here the ademption of the legacy swells the *quantum* of the residue for the benefit of the residuary legatees. This arises not from the application of the doctrine, but in spite of it, and therefore, where a testator bequeaths his residue equally between his wife or a stranger, and his child, and then advances the child in his lifetime, here the advance is not brought into account so as to augment the residue [* 408] for the benefit * of the wife or stranger, but the wife or stranger can claim only the moiety of the actual residue (*t*).

Ademption
and satis-
faction dis-
tinguished.

15. Ademption and satisfaction are often confounded, but one broad distinction between them must not be lost sight of. Where the will precedes and the settlement follows the settlement is an actual *extinguishment* of the claim under the will. But where the settlement precedes and the will or gift follows, here as the settlement created a legal obligation or vested a legal right by act *inter vivos*, the subsequent testamentary disposition cannot annul it, but all that equity can do is to put the parties entitled under the legal obligation or legal gift, to their *election*. Thus, a testator bequeaths 1000*l.* to his daughter, and afterwards on the daughter's marriage settles 1000*l.* upon her. Here the will is considered as revoked, and the claims under the will are actually extinguished. If on the other hand, a father covenants on the daughter's marriage to settle 1000*l.* upon her and afterwards by will bequeaths 1000*l.* to the daughter, here the legal obligation under the settlement remains, and the daughter if she chooses may insist on her claims under the settlement. But if she does so, the Court will not also allow her to claim under the will, or in other words the Court puts her to her election (*u*).

(*t*) *Meinertzhagen v. Walters*, 7 L. R. Ch. App. 670; [and see *Stewart v. Stewart*, 15 Ch. D. 539.]

(*u*) *Chichester v. Coventry*, 2 L. R. H. L. 90, *per* Lord Romilly; *Russell v. St. Aubyn*, 2 Ch. D. 398; *Thomas v. Kemeys*, 2 Vern. 348; *Copley v. Copley*, 1 P. W. 147; *Byde v. Byde*, 2 Eden, 19. As to interest on the advance made after the date of the will, see the decree in *Beckton v. Barton*, 27 Beav. 106.

SECTION II.

WHAT AMOUNT IS RAISABLE UNDER THE HEAD OF PORTIONS.

THIS question arises as to capital and interest, and maintenance money and costs.

1. As to the amount of *capital* to be raised, the instrument itself generally prescribes the sum with sufficient exactness, and according to the common form now adopted in settlements, the amount graduates according to the number of children, *i. e.* a certain sum if there be only one younger child who takes a vested interest, an increased sum if there be two such children, and a larger sum still if there be three or more such children. Capital.

* 2. Occasionally the settlement has been so [* 409] ambiguously expressed with reference to the events contemplated, that recourse to the Court has become necessary. Thus, in *Hemming v. Griffith (v)*, the trust was that if there should be one younger child the trustee should raise 8,000*l.*, and if two younger children 12,000*l.*, and if three or more younger children 15,000*l.*, the said portions to be paid as the husband and wife or the survivor should appoint, and in default of appointment the portions to vest in sons at twenty-one, and in daughters at twenty-one or marriage, and the settlement contained powers of maintenance and advancement out of the portions after the death of the parents, or in their lifetime with their consent. There were three younger children, but two of them died in infancy; and the question was whether the one who attained twenty-one was entitled to the 8,000*l.* or the 15,000*l.* Sir J. Stuart said, "It seems clear enough that if there should be three or more younger children, during the infancy of the three children the trusts for raising the 15,000*l.* were to have an operation and might be resorted to for the purposes of advancement and maintenance. If so, how can anything which has happened since the three younger children were born, reduce the trust for raising 15,000*l.* to a trust for raising 8,000*l.* only which was to be raised expressly, and in terms, in the event of there being only one younger child?" and the surviving portionist was declared entitled to the 15,000*l.* Ambiguity.

(v) 2 Giff. 403.

Interest.

3. The right to interest and the rate of it, and the time from which it is to be calculated, should all be specified in the settlement, but in the absence of any express direction, a portion like any other sum of money charged on land, will carry interest with it by implication from the time when the capital ought to have been raised (*w*), and this interest will in England be at 4 per cent. (*x*); and in Ireland at 5 per cent. (*y*). But if the settlement while it is silent as to the interest on the portions, expressly and carefully and with all necessary circumstantiality provides for the interest on all the other charges, the presumption arises that interest on the portions was intentionally excluded, and the Court considers the general rule as inapplicable (*z*).

Out of rents.

[*410] *4. In the rare case where the portions are to be raised not by sale or mortgage out of the corpus of the estate, but out of the annual rents and profits, the Court looking to the hardship of allowing the interest to accumulate for years against the income, raises the capital only and gives no interest (*a*).

Interest giving, though portion not vested.

5. Where there is the relation of father and child, or of a person standing *loco parentis* and a child, the natural duty and therefore the presumed intention of providing for the child is so strong as to have led to the establishment of peculiar principles. Some of these have already passed under review, and another is this:

Maintenance.

A legacy given to a *stranger* and payable at the age of twenty-one carries no interest in the meantime, but a legacy to a child being an infant (*b*) and payable at twenty-one, if maintenance be not otherwise provided for the child (*c*), carries interest with it (*d*) from the death of the testator, and not as in ordinary legacies

(*w*) *Evelyn v. Evelyn*, 2 P. W. 669, *per Cur.*; *Hall v. Carter*, 2 Atk. 358, *per Cur.*; *Earl of Pomfret v. Lord Windsor*, 2 Ves. sen. 487, *per Cur.*

(*x*) *Young v. Waterpark*, 13 Sim. 199; affirmed 15 L. J. N. S. Ch. 63; [*Balfour v. Cooper*, 23 Ch. D. 472.]

(*y*) *Purcell v. Purcell*, 1 Conn. & Laws. 371; [*Balfour v. Cooper*, 23 Ch. D. 472;] and see *Young v. Waterpark*, 13 Sim. 199; *Denny v. Denny*, 14 L. T. N. S. 854.

(*z*) *Clayton v. Earl of Glengall*, 1 Dr. & W. 1; S. C. 1 Conn. & Laws. 311.

(*a*) *Ivy v. Gilbert*, 2 P. W. 13; *Evelyn v. Evelyn*, 2 P. W. 659. But see *Ravenhill v. Dansey*, 2 P. W. 179.

(*b*) *Raven v. Waite*, 1 Sw. 553.

(*c*) *Mitchell v. Bower*, 3 Ves. 287; *Long v. Long*, *Ib.* 286, note; *Wynch v. Wynch*, 1 Cox, 433.

(*d*) See *Crickett v. Dolby*, 3 Ves. 16; *Raven v. Waite*, 1 Sw. 557; *Beckford v. Tobin*, 1 Ves. sen. 308; *Hill v. Hill*, 3 V. & B. 183; *Tyrrell v. Tyrrell*, 4 Ves. 1; *Chambers v. Goldwin*, 11 Ves. 1; *Lowndes v. Lowndes*, 15 Ves. 301.

from the expiration of one year from the testator's death (e). So a *portion* charged on land in favour of a child, whether made payable at a particular age or without any direction as to payment, will carry interest with it from the death of the testator. But as the rate of interest is discretionary, the Court has not considered itself bound by the general rule of 4 per cent., but has regulated itself by the circumstances of each particular case. The application of these principles will be best understood by the following instances:

Rate of interest.

In *Warr v. Warr* (f) a father charged the estate with portions for younger children, "to be paid at *such time* as the trustees should *appoint* for their better maintenance and preferment." There were three younger children, a son and two daughters. The son was apprenticed to a sea captain and a sum paid by the trustees for his outfit; the two daughters attained twenty-one and received their portions. The son died under age before the trustee had named any day for payment of his portion. It was ruled that the son's portion was not to be raised, as he had not lived to want it; but it was "agreed that all the children were to be maintained out of the trust estate, they having no maintenance in the meantime, and what had been employed for putting out the younger son was to come out of the trust estate."

* In *Staniforth v. Staniforth* (g) an estate [* 411] was settled on the father and mother successively for life, with the remainder in default of issue male to trustees for a term of five hundred years in trust to raise 1,000*l.* for the daughters' portion, but *no time* was appointed for payment. The father died without issue male, leaving a daughter who filed her bill, living the mother, to have the 1000*l.* raised. The M. R. held: 1. That by the failure of issue male the term had arisen, though not to take effect in possession until the death of the mother. 2. That the portion vested in the daughter in the lifetime of the mother (the daughter it is presumed having attained twenty-one); and 3. That no time being appointed for the payment of any portion, nor any maintenance in the meantime, she was entitled to a *reasonable maintenance not exceeding the interest of the portion from the death of the father*, or at the least from such time as the portion might have been raised by sale.

(e) *Cary v. Askew*, 1 Cox, 241; *Mole v. Mole*, 1 Dick. 310

(f) Pr. Ch. 213.

(g) 2 Vern. 460.

* 3 LAW OF TRUSTS.

Beal v. Beal (*h*) was this: An estate was settled on the father and mother successively for life, with remainder to the father's brother in tail, &c., and a power to charge portions was limited to the father. He appointed the sum of 2,000*l.* for his two daughters, payable at eighteen or marriage, but without saying after the death of his wife, and then died. The two daughters, who were under eighteen, filed their bill in the lifetime of the mother, to have interest for their portions until raisable. Lord Harcourt decreed that they should have interest at 3 per cent. until they were twelve years old, and then 4 per cent. until the portions were raisable. Being dissatisfied with the rate of interest, they had the case re-heard before Lord Cowper, who said he thought the former decree very tender in the provision thereby made, and that it was rather a recommendation to the mother to make them that allowance than a decree to charge her jointure therewith, but that since they were not satisfied, he must now give them no more than what in strict justice they could demand, and that since the portions were not payable till eighteen or marriage, he could not charge the jointress with interest thereof in the meantime, but that as the reason for postponing the payment till eighteen was in favour of the jointress, she *ought to maintain them* out of the profits of her jointure lands.

In *Harvey v. Harvey* (*i*) a testator charged all his real and personal estate with 1,000*l.* a-piece to all his younger children, payable at twenty-one, but gave *no directions as to maintenance* in the meantime. The younger children during their infancy filed their bill to be allowed interest or maintenance. The M. R. said [* 412] * "that in this case the Court would do what in common presumption a father if living would, nay, ought to have done, which was to provide necessaries for his children, but a Court of Equity would make hard shifts for the provision of children, as where the younger children were left destitute and the eldest an infant, the Court would make such a liberal allowance to the guardian of the eldest, as that he might thereout be enabled to maintain all the children. And for the same reason the Court would likewise take a latitude in this case, and that since interest was pretty much in the breast of the Court, though the will was silent with regard to that, yet it should be presumed that the father who gave these legacies intended they should carry

(*h*) Pr. Ch. 405.

(*i*) 2 P. W. 21.

interest if the estate would bear it, for every one must suppose it to have been the intention of the father that his children should not want bread during their infancy, but that where the estate appeared to be small, the Court, in whose discretion it always lay to determine the quantum of interest, had ordered the lower interest."

6. It will be collected from the preceding cases that portions provided for children have this peculiar quality, that whether made payable at a certain age or not, they are so far contingent as not to be raisable, but to sink into the land, where the children do not live to want their portions—that is, where the children being sons do not attain twenty-one, or being daughters do not attain that age or marry; but that on the other hand portions are so far considered vested as to carry with them such a rate of interest or such allowance as the Court may deem necessary for the reasonable maintenance of the children. General rule.

7. As regards the *costs* of raising portions the general rule as to charges applies, that is, the costs must be thrown on the estate, and the portions bear no part of them (*j*), and of course under the head of costs will be included all charges and expenses properly incurred. Costs.

SECTION III.

AT WHAT PERIOD THE PORTIONS ARE RAISABLE.

1. We have next to inquire at what *period* the portions are to be raised, and upon this subject the great contest has been whether they shall or not be raised while the security created for the purpose * is [* 413] still *reversionary*. The cases are unusually numerous and extremely conflicting, and the only result to be obtained is that the question must be decided by the "penning of the trust," or in other words, that if the instrument be unequivocal in itself as to the actual intention of the parties, the Court must carry out the intention whatever may be the consequential inconvenience. A sale or mortgage must necessarily be made at a disadvantage when the security is reversionary, but if the meaning be clear it must be done. We cannot better explain the principles by which the Court is now

(*j*) *Armstrong v. Armstrong*, 18 L. R. Eq. 541; *Michell v. Michell*, 4 Beav. 549; *Trafford v. Ashton*, 1 P. W. 415. Portions out of reversions.

regulated, than by a statement of the two leading authorities.

Codrington v. Foley.

2. In *Codrington v. Foley* (*k*) a testator devised an estate to trustees for ninety-nine years from the testator's decease, remainder to Lord Foley for life, remainder to other trustees for 1,000 years, to commence from the death of Lord Foley, for raising 30,000*l.* for portions of younger children, remainder to the first and other sons of Lord Foley in tail. The trusts of the term of ninety-nine years were for applying the rents with the proceeds of the timber in discharge of certain incumbrances. Lord Foley died in 1793, leaving an only son, and a daughter who became Mrs. Codrington. Mr. and Mrs. Codrington filed their bill to have the 30,000*l.* raised, and it was objected that the trusts of the term of ninety-nine years were still in operation and unsatisfied, and that the 1,000 years' term was consequently reversionary both at law and in equity, and while so reversionary it could not be sold or mortgaged, to the great injury of the tenant in tail. Lord Eldon came to the conclusion that the 30,000*l.* must be raised, though the term for raising it was reversionary, and after reviewing the opinions of Lord Cowper, Lord Macclesfield, Lord Hardwicke, Lord Talbot, Lord Thurlow, and Lord Alvanley upon the subject (*l*), he proceeded "Upon this general state of the doctrine of the Court, it appears to me that the proper rule is what Lord Talbot states—that the raising or not raising must depend upon the particular penning of the trust, and the intention of the instrument. I do not think the Court ought to be eager to lay hold of circumstances. The Court ought to hold an equal mind whilst construing the instrument, and I cannot agree with what is stated in *Stanley v. Stanley* (*m*) that very small grounds are sufficient. If they are sufficient to denote the intention, they are not small grounds. If they are not sufficient to denote the intention, the Court does not act according to its duty by treating them as sufficient, thereby disappointing the true [* 414] * intention of the instrument. The rule upon the whole depends upon this, whether it was the intention, attending to the whole of it, that the portion should or should not be raised in this manner. If there be nothing more than a limitation to the parent for life, with a (reversionary) term to raise portions at

(*k*) 6 Ves. 364.

(*l*) The whole judgment well deserves a perusal.

(*m*) 1 Atk. 549.

the age of twenty-one or marriage, and the interests are vested and the contingencies have happened at which the portions are to be paid, the interest is payable and the portions *must be raised*, in the only manner in which they can be raised, that is, by mortgage or sale of the reversionary term" (n).

3. In *Codrington v. Foley* the term for raising the portions was reversionary upon another term, the trusts of which were unsatisfied: but in the case of *Smyth v. Foley* (o) it was reversionary upon the life estate of the father, and yet the same result followed.

Thus an estate was limited by settlement upon marriage to R. Chambers for life, remainder to M. E. his wife for life in bar of dower, remainder to trustees for 500 years, remainder to the first and other sons successively in tail, and the trusts of the term were declared to be by sale or mortgage or other means to raise 4,000*l.* for the younger children, the portions "to be paid" at their respective ages of twenty-one years, and of daughters at those ages or marriage; and upon further trust "until the same portions should become payable as aforesaid, to raise a competent yearly sum out of the rents and profits," for maintenance and education, with a power "after the decease of Richard Chambers, or in his lifetime with his consent," to raise moneys for advancement. There were six children of the marriage, three sons and three daughters, all of whom attained twenty-one. After the death of M. E. Chambers the wife, but in the lifetime of R. Chambers, the younger children filed their bill to have the 4,000*l.* raised. Baron Alderson in giving judgment laid down the following rules: That *First*, where a term is limited in remainder to commence in possession after the death of the father, yet if the trust is to raise a portion payable at a fixed period, the child shall not wait for the death of the father before the portion is raised, but at the fixed period may compel a sale of the term (p). *Secondly*. Where the period is not fixed by the original settlement, but depends on a contingency, the rule applies as soon as the contingency happens (q). *Thirdly*. Where not only *the period but [* 415]

(n) 6 Ves. 379.

(o) 3 Y. & C. 142.

(p) *Sandys v. Sandys*, 1 P. W. 707; *Hellier v. Jones*, 1 Eq. Ca. Ab 337; *Bacon v. Clerk*, Pr. Ch. 500; *Stanley v. Stanley*, 1 Atk. 549; *Conway v. Conway*, 3 B. C. C. 267; *Brome v. Berkley*, 2 P. W. 486, *per Cur.*; *Cotton v. Cotton*, 3 Y. & C. 149, note.

(q) As where the portions are to vest at such times as the father shall appoint and he has not yet appointed.

the class of children, in favour of whom the portions are to be raised, depends on a contingency (as when it is limited to take effect in case the father dies without issue male by his wife), there also on the contingency happening by the death of the wife without issue male the portions are raisable immediately, and the term is salable in the lifetime of the father (*r*). The Judge then expressed his entire concurrence in the principles laid down by Lord Eldon (*viz.* that the intention must be collected from the whole settlement taken together), and finding an express direction that the portions were to be paid at twenty-one or marriage, and that the settlement contained nothing at variance with that construction, he decreed the portions to be raised by sale or mortgage of the reversionary term.

General rule
and excep-
tions.

4. Such are the general rules by which the Courts now profess to be governed. We must, however, add the caution that when the grounds upon which the Court acted in any case are not sufficient to warrant the decision upon a fair construction of the *instrument* itself, and independently of and apart from any arguments based on the *inconvenience* of burdening the estate, such case cannot at the present day be relied upon as an authority.

And *particular* and *special* cases have occurred in which the Court has refused to raise the portions out of a reversionary term.

Thus, in *Corbett v. Maidwell* (*s*), the estate was settled upon marriage on Thomas for life, remainder to trustees for 500 years, remainder to the heirs male of of the body of Thomas by his intended wife; "and if he died without issue male by his intended wife, and there should be one or more daughters which should be *unmarried or unprovided for at the time of his death*," then to raise portions for the daughter or daughters payable at eighteen or marriage with maintenance in the meantime. The wife died without issue male, but leaving a daughter who married, and she and her husband filed their bill to have the portions raised during the father's life. The Court refused the relief asked, on the ground that the portion was contingent on the daughter being unmarried and unprovided for at the

(*r*) *Hebblethwaite v. Cartwright*, For. 30; *Greaves v. Mattison*, 1 Eq. Ca. Ab. 336; *Ravenhill v. Dansey*, 2 P.W. 180; *Smith v. Evans*, Amb. 633; *Staniforth v. Staniforth*, 2 Vern. 460. In other cases the contingency did not occur. See *Worsley v. Granville*, 2 Ves. sen. 331; *Hall v. Hewer*, Amb. 203; *Corbett v. Maidwell*, 1 Salk. 159.

(*s*) 1 Salk. 159.

father's death, a contingency which had not yet happened.

In *Butler v. Duncomb* (t), the marriage settlement limited the estate to George for life, remainder to Mary for life, remainder * to the first and other sons [* 416] in tail male, remainder to trustees for 500 years upon trust, that the trustees should "from and after the commencement of the term" raise portions for the younger children payable at twenty-one or marriage; remainder to George in fee. George died, leaving a daughter the only issue, who married, and then she and her husband filed their bill to have the portion raised in the lifetime of the mother. But the Court declined to make any such order, as the trust was to raise the portion from and after the commencement of the term, which meant the commencement *in possession*, and that this implied a negative, viz. that it was not to be raised before.

In *Brome v. Berkley* (u) the marriage settlement was to George for life, remainder to the wife for life for her jointure, remainder to the first and other sons in tail, remainder to trustees and their heirs to raise portions for daughters, payable at twenty-one or marriage with *maintenance in the meantime*, "the first payment of the maintenance money to be made at such half-yearly feast as should next happen after the estate limited to the trustees should take effect in possession." The husband died leaving no issue but a daughter who attained twenty-one, and filed her bill in the mother's lifetime, to have the portion raised. Lord King dismissed the bill, on the ground that the maintenance was not to be raised until the estate of the trustees came into possession, and "it was absurd to say that the portion should be raised first, and the maintenance money paid afterwards."

In *Stevens v. Dethick* (v) the estate was limited to Dethick for life, remainder to his wife for life, remainder to his first and other sons in tail, remainder to trustees for 500 years, to raise portions for daughters payable at twenty-one or marriage, with a direction that the daughters should have maintenance out of the premises comprised in the term "and that the residue of the rents, issues, and profits above such yearly maintenance should in the meantime, till the portions became pay-

(t) 1 P. W. 448; and see *Churchman v. Harvey*, Amb. 335.

(u) 2 P. W. 484. But see *Cotton v. Cotton*, 3 Y. & C. 149, note.

(v) 3 Atk. 39; and see *Reynolds v. Meyrick*, 1 Eden, 48. But see *Cotton v. Cotton*, 3 Y. & C. 149, note.

able, be received by such persons as should be *entitled to the reversion* expectant upon the determination of the said term." Lord Hardwicke considered the latter clause to show an intention, that the maintenance money and therefore also the portion itself was not to be raised until the term fell into possession. He therefore dismissed the bill filed by the only daughter after the death of her mother, but in the lifetime of her father.

[* 417] * In *Massy v. Lloyd* (*w*) the estate was limited to trustees for 999 years upon trust for the wife for her life, and after her decease upon trust to pay an annuity to the husband, and to apply the *residue* of the rents during the husband's life, as the wife should appoint (a power which was executed), and on the death of the survivor of the husband and wife to raise 15,000*l.* for younger children's portions, and subject as above the estate was settled on the first and other sons in tail. The wife died, and it was held that the portions were not raisable during the life of the husband. The case was a very special one, but the argument that chiefly prevailed was based upon the fact that all the *rents, issues, and profits* during the lifetime of the husband had been *expressly disposed of otherwise*.

5. Hitherto we have adverted only to the question whether portions shall be raised, while the term charged with them is still *reversionary*. But there are also other circumstances affecting the portionists *personally*, which have a material bearing upon the inquiry, at what time the portions are to be raised.

Time of
raising por-
tions in
special cases.

6. If a specific sum be given to A., payable at her age of twenty-one, or day of marriage, the money cannot be raised until the interest has become vested; for should the fund on which the money raised is invested prove deficient, the portionists might still have recourse to the estate (*x*). And so where the trust of a term was to raise 3,000*l.* for younger children, payable at their respective ages of twenty-one years, or days of marriage, it was held that the trustees were not authorized, when one child had attained his age of twenty-one years, to raise the entire sum, for the infant children could not be deprived of the real security for their shares (*y*). But from the manifest convenience of raising the portions at once, it seems the Court will lean to that construction where anything appears upon

(*w*) 10 H. L. Cas. 248; 11 Ir. Eq. Rep. 429; 12 Ir. Eq. Rep. 298.

(*x*) *Dickinson v. Dickinson*, 3 B. C. C. 19.

(*y*) *Wynter v. Bold*, 1 S. & S. 507.

the instrument to warrant such a course. Thus the trustees of a marriage settlement were directed, after the death of the husband, to levy and raise by mortgage, sale, or other disposition of the estate, if there should be more than three children, the sum of 10,000*l.* for their portions, the shares of the sons to be vested in, and payable to them at the age of twenty-one, and the shares of the daughters at twenty-one or marriage; and it was provided that *no mortgage should be made until some one of the portions should become payable*. Four of the children had attained *twenty-one [*418] and three were under age; and the Vice-Chancellor said, "In this settlement there is a clause that no mortgage is to be made until some one of the portions shall become payable. The whole 10,000*l.* must therefore be raised at once. It is objected that some of the shares may become diminished in amount; the answer to that is, that the Court considers the investment in the 3 per cent. Consols as equivalent to payment. If there is any rise in the funds the children under age will have the benefit of it" (z).¹

SECTION IV.

IN WHAT MODE THE PORTIONS ARE TO BE RAISED.

WHERE an estate is settled subject to portions, the presumed intention is that the portions should impede as little as possible the devolution of the property in the main channel of the limitations. Moral duty requires that some support should be secured for the younger children, but this should be done at as little sacrifice as circumstances will allow to the family consequence as represented by the eldest son.

1. In raising portions, therefore, it is *prima facie* Modes of raising portions. undesirable to *sell* any part of the estate. So recourse should rather be had to levying the required amount by a side wind, as by the produce of *mines* or a fall of

(z) *Gillibrand v. Goold*, 5 Sim. 149.

¹ If a trustee be directed to raise a portion out of rents and profits before or at a particular time, the court may direct it to be raised out of rents or profits in hand, or may order a contribution toward the portion by those to whom the rents have been paid, the trustee having allowed his term to expire without raising the portion. *Hawley v. James*, 5 Paige, 318; see *Perry on Trusts* (3d ed.), § 583.

timber; or, if this cannot be done, then by a mortgage rather than by an absolute disposition, for though a mortgage is usually accompanied with a power of sale, so that eventually the property may pass into the hands of a stranger, yet until actual sale the owner under the settlement has the opportunity of paying off the charge from his private means. In every case, however, the language of the instrument must govern. If portions be simply charged on an estate, either expressly or by implication, (as where a charge is implied from a power limited to the portionist of distraining for non-payment (a), the money may be raised by mortgage or sale as in the case of any other charge.

Where a
sale is
excluded.

2. A trust to raise the portions by mortgage will not authorize a sale, but if the trust be to levy the amount by mortgage or otherwise a power of sale is implied (b). If the trust be to raise the charge by and out of the [* 419] rents or by such other ways and means except * a sale as the trustees may think proper, not only a sale is prohibited but a mortgage also which may lead to an absolute disposition, as it enables the mortgagee by foreclosure to get possession of the estate (c).

Out of income
or corpus.

3. If the portions be raisable by and out of the rents and profits or by mortgage, here the words are ambiguous, and are capable of the construction that the trustees have an option of levying the portions either out of the income or out of the corpus, and so of throwing the onus at their discretion either upon the tenant for life or upon the remainderman (d). But the Court will lean strongly against such a construction (e). In some cases the meaning is that the annual rents should be primarily charged, and that the deficit only should be raised out of the corpus. Thus where the trustees were to hold an estate during the minority of the devisee, and to raise portions by and out of the rents and profits or by sale or mortgage, and on the devisee attaining the age of twenty-one to pay the rents to him after payments of the portions, the Court said that as the devisee on attaining twenty-one was to take such accumulated rents and profits only, as should remain after satisfying the portions, the testator intended that the rents and profits should be first applied, and

(a) *Meynell v. Massey*, 2 Vern. 1.

(b) *Tasker v. Small*, 6 Sim. 625.

(c) *Bennett v. Wyndham*, 23 Beav. 521.

(d) See *Hall v. Carter*, 2 Atk. 354.

(e) See the cases referred to, ante p. 367.

that the balance only could be raised by sale or mortgage (*f*).

[Where the portions were raisable "by mortgaging or otherwise disposing of the lands, or out of the rents and profits, or by any other ways or means," and unsuccessful efforts had been made to raise the portions by mortgage of the property, it was held that the trustees were at liberty to apply the rents and profits first in payment of the interest, and secondly in reduction of the capital of the portions (*g*).]

4. A more common case is where the portions are directed to be raised out of the rents and profits simply, and nothing more is said. Here if a definite time be fixed for payment of the portions, the ordinary and *prima facie* meaning of rents and profits is taken to be inconsistent with the direction for payment at a time certain, and recourse is therefore had to the corpus by sale or mortgage. But even if a definite time of payment be not an ingredient in the case, yet from the very nature of portions, as rents and profits without stint represent the whole estate, the Court assumes the * jurisdiction of ordering a sale or mort- [* 420] gage (*h*)¹; and where there is no suit pending the trustees of an estate subject to such a charge may sell or mortgage, if they can find a purchaser or mortgagee, without the intervention of the Court (*i*).

5. If, however, the clear intention be that *annual* rents and profits only are meant, the Court cannot break in upon the corpus; and such is the case where the portions are directed to be raised *expressly* out of the *annual* rents (*k*); or where it is evident from the

(*f*) *Warter v. Hutchinson*, 1 S. & S. 276; and see *Okeden v. Okeden*, 1 Atk. 550.

(*g*) *Balfour v. Cooper*, 23 Ch. D. 472.]

(*h*) *Warburton v. Warburton*, 2 Vern. 420; *Sheldon v. Dormer*, 2 Vern. 340; *Baines v. Dixon*, 1 Ves. sen. 41; *Hall v. Carter*, 2 Atk. 358, *per* Lord Hardwicke; *Backhouse v. Middleton*, 1 Ch. Ca. 173; *Green v. Belcher*, 1 Atk. 505; *Trafford v. Ashton*, 1 P. W. 415; *Countess of Shrewsbury v. Earl of Shrewsbury*, 1 Ves. jun. 234, *per Cur.* *Okeden v. Okeden*, 1 Atk. 550; and see *Allen v. Backhouse*, 2 V. & B. 65; [*Re Barber's Settled Estates*, 18 Ch. D. 624;] *Bootle v. Blundell*, 1 Mer. 233; *Anon.* 1 Vern. 104, in which it was said that rents and profits could not receive this enlarged construction in a deed; *Garmstone v. Gaunt*, 1 Coll. 577; *Lingon v. Foley*, 2 Ch. Ca. 205; *Mills v. Banks*, 3 P. W. 1.

(*i*) *Backhouse v. Middleton*, 1 Ch. Ca. 176 *per Cur.*

(*k*) *Anon.* 1 Vern. 104; *Solley v. Wood*, 29 Beav. 482.

¹*Schermerhorne v. Schermerhorne*, 6 Johns. Ch. 70.

whole context that by rents and profits were intended the *annual rents* (l).

Out of rents
or otherwise,
except a
sale.

6. In *Bennett v. Windham* (m), where the trust was to raise the charge out of the rents and profits, or by *such other ways and means* except a sale as the trustees should think proper, the Court on the one hand collected an intention that annual rents and profits were meant, and on the other hand that the tenants for life were not to be deprived of all usufructuary enjoyment, and the Court adopted a middle course by holding that part of the rents should be impounded and part handed over to the tenants for life, and referred it to chambers to inquire what proportion of the rents ought to be impounded, and what to be paid to the tenant for life.

Mines and
timber.

7. In *Offley v. Offley* (n) a term was created for raising 10,000*l.* for a daughter's portion, but the term was so short that the ordinary *profits* of the land would not raise above half the sum. There was an open coal mine in the land which the Court ordered to be wrought, with powers to the trustees to make soughs and drains as need should require, and Lord Commissioner Hutchins said that in such a case where the *usual profits* of the land would not *raise the money appointed within the time*, the Court might order *timber* to be felled off the land to make up the amount.

Out of rents
by fixed
annual pay-
ments.

8. If the trusts of a term be to "raise and levy from [* 421] *time to time* a sum certain, by with and out of the rents and profits, by certain annual payments or sums in each year and *not otherwise*," the portional sum to be raised is a charge on the annual rents and profits generally, and the estate is not discharged at the expiration of six years, though the rents and profits during that period were sufficient to raise it (o)¹

Mortgage of
undivided
shares of the
estate.

9. Where portions are raisable at different times as they are wanted, it is usual, as each portion is raised, not to mortgage the *entire* estate charged, but a proportional part only. Thus if the portional sum be 6,000*l.* divisible among three younger children, and secured by a term of 1,000 years, when the first 2,000*l.* is raised, the trustee of the term mortgages an *undivided*

(l) *Mills v. Banks*, 3 P. W. 1; *Wilson v. Halliley*, 1 R. & M. 590; *Ivy v. Gilbert*, 2 P. W. 13; *Evelyn v. Evelyn*, 2 P. W. 659, see 666; *Earl of Rivers v. Earl of Derby*, 2 Vern. 72; *Okeden v. Okeden*, 1 Atk. 550.

(m) 23 Beav. 521.

(n) Pr. Ch. 26.

(o) *Re Forster's Estate*, 4 I. R. Eq. 152.

¹ *Fox v. Phelps*, 17 Wend. 393; 20 Wend. 437.

third part of the hereditaments comprised in the term, and when the second 2,000*l.* is raised, another undivided third part, and when the remaining 2,000*l.* is raised, the other undivided third part. The result of this is, that each mortgagee takes the *legal estate* in the subject of the mortgage, whereas if the entire estate had been comprised in the first mortgage, the two other securities would have been equitable, and exposed to all the consequent risks.

10. Trustees of a term of years for raising portions as between them and the freeholder are not entitled to the custody of the title deeds, and cannot deliver them to a mortgagee. But they and their mortgagees have a right in equity to the production of them for all necessary purposes (*p*).

11. By 36 & 37 Vict. c. 66, s. 34, subs. 3, all causes and matters for raising portions are to be assigned to the Chancery Division of the High Court of Justice. Custody of title deeds.
36 & 37 Vict. c. 66.

(*p*) *Churchill v. Small*, 8 Ves. 322, note (*b*); *Harper v. Faulder*, 4 Mad. 129, 138; *Wiseman v. Westland*, 1 Y. & J. 117; *Hotham v. Somerville*, 5 Beav. 360.

DUTIES OF TRUSTEES FOR SALE¹.

THE subject of trusts for sale may be conveniently distributed under three heads : *First*, The general duties of trustees for sale ; *Secondly*, The power of trustees to sign discharges for the purchase-money ; and *Thirdly*, The disability of trustees to become purchasers of the trust property.

SECTION I.

THE GENERAL DUTIES OF TRUSTEES FOR SALE.

Trustees may sell without applying to the Court.

1. It need scarcely be observed that trustees for sale where they are not parties to a suit, are authorized to enter into contracts without the previous sanction of the Court (a) ; ² but where a suit has been instituted for the execution of the trust, *that* attracts the jurisdiction of the Court, and the trustees would not be justified in proceeding to a sale without the Court's sanction (b). ³ Private contracts, therefore, after the institution of a suit, can only be entered into by trustees subject to the approbation of the Court, and a condition is commonly annexed that the contract shall be null and void, unless the sanction of the Court be obtained within a limited period. Cases have occurred where, from accidental circumstances, the sanction has not been obtained within the time, and then by the death of the purchaser the contract has dropped to

(a) *Earl of Bath v. Earl of Bradford*, 2 Ves. 590, *per* Lord Hardwicke.

(b) *Walker v. Smalwood*, Amb. 676 ; and see *Raymond v. Webb*, Loft, 66 ; *Drayson v. Pocock*, 4 Sim. 283 ; *Culpepper v. Aston*, 2 Ch. Ca. 116, 223 ; and see further, *infra*.

[¹ It should be borne in mind that under the Settled Land Acts, restrictions are placed on the powers of trustees to sell settled land. This subject is dealt with in chap. xxiii, sect. 2, v. to which the reader is referred.]

² *Low v. Brinnan*, 19 Io. 193.

³ If the suit pending is to determine the validity of a prior sale and that sale is set aside, the trustee may sell again without an order from the Court : *Reeside v. Peter*, 35 Md. 221.

* the ground; and the representatives of the [* 423] purchaser have not felt themselves justified in renewing it. The better mode would be to give *liberty* to the purchaser at any time after the expiration of the limited period, but before any confirmation by the Court, to determine the contract.

2. A trustee for sale will remember that he is bound by his office to sell the estate under every possible advantage to his *cestuis que trust* (c),¹ and in the case of several successive *cestuis que trust*, with a fair and impartial attention to the interests of all the parties concerned (d). If trustees, or those who act by their authority, fail in reasonable diligence in inviting competition (e),² or in the management of the sale (as if they contract under circumstances of haste and improvidence, or contrive to advance the interests of one party at the expense of another), they will be personally responsible for the loss to the suffering party (f);³ and the Court, however correct the conduct of the purchaser, will refuse at his instance to compel the specific performance of the agreement (g). But if a trustee has once contracted to sell *bonâ fide*, a Court of equity will not allow the contract to be invalidated because another person comes forward and is willing to give a higher price (h); and where there are two offers equally advantageous, one of which is preferred by a *cestui que trust*, it is not the duty of the trustees against their own opinion to accept the offer preferred by such *cestui que trust* (i).

Must consult the interest of the *cestuis que trust*.

3. In no case will the Court enforce the specific per-

(c) *Downes v. Grazebrook*, 3 Mer. 208, *per* Lord Eldon; and see *Matthie v. Edwards*, 2 Coll. 480.

(d) *Ord v. Noel*, 5 Mad. 440, *per* Sir J. Leach; and see *Anon. case*, 6 Mad. 11.

(e) *Ord v. Noel*, 5 Mad. 440, *per* Sir J. Leach; and see *Harper v. Hayes*, 2 Giff. 217.

(f) See *Pechel v. Fowler*, 2 Anst. 550.

(g) *Ord v. Noel*, 5 Mad. 440, *per* Sir J. Leach; *Turner v. Harvey*, Jac. 178, *per* Lord Eldon; *Bridger v. Rice*, 1 J. & W. 74; *Mortlock v. Buller*, 10 Ves. 292; and see *Hill v. Buckley*, 17 Ves. 394; *White v. Cuddon*, 8 Cl. & Fin. 766.

(h) *Harper v. Hayes*, 2 Giff. 210, reversed 2 De G. F. & J. 542.

(i) *Selby v. Bowie*, 4 Giff. 300.

¹ *Gould v. Choppel*, 42 Md. 466; *Chesley v. Chesley*, 49 Mo. 560.

² *Reeside v. Peters*, 33 Md. 120.

³ *Chesley v. Chesley*, 45 Mo. 440; *Ringold v. Ringold*, 1 H. & Gill. 11; *Osgood v. Franklin*, 2 Johns. Ch. 27; *Quackenbush v. Leonard*, 9 Paige, 347.

Where sale is a breach of trust. *formance of a contract which amounts to a breach of trust (k).*

Cestuis que trust may contract conditionally.

4. The usual course is said to be for the *cestuis que trust*, who are the persons most interested in the matter, and who have the strongest motives for obtaining the highest possible price, to enter into a conditional contract, and then to obtain the assent of the trustee, who, when he has satisfied himself that the sum proposed [* 424] * is the value of the property, sanctions a sale which is beneficial to his *cestuis que trust (l).*

Valuation of the property.

5. A trustee for sale must inform himself of the real value of the property, and for that purpose, will, if necessary, employ some experienced person to furnish him with an estimate (m). If the property be sold at a grossly inadequate value, it is a breach of trust, which affects the title in the hands of the purchaser (n).¹

Each trustee responsible for the sale.

6. A trustee who takes no active part in the business cannot excuse himself by saying he had nothing to do with the conduct of the other to whom the management was confided; for where several trustees commit the entire administration of their trust to the hands of one, they are all equally responsible for the faithful discharge of their joint duty by that one whom they have substituted (o).²

What time allowed for disposing of the estate.

7. The trustees will be allowed a reasonable time for disposing of an estate, and though the instrument creating the trust direct them to sell "*with all convenient speed,*" that is no more than is implied by law, and does not render an immediate sale imperative (p). On the other hand, if the trust be to sell "at such time and in such manner as the trustees shall think fit," this will

(k) *Wood v. Richardson*, 4 Beav. 176, *per* Lord Langdale; *Fuller v. Knight*, 6 Beav. 205; *Thompson v. Blackstone*, 6 Beav. 470; *Sneesby v. Thorne*, 7 De G. M. & G. 399; *Mucholland v. Belfast*, 9 Ir. Ch. Rep. 204; *Saunders v. Mackeson*, W. N. 1866, p. 400; [*Oceanic Steam Navigation Company v. Sutherland*, 16 Ch. D. 236; *Dunn v. Flood*, 25 Ch. D. 629; W. N. 1885, p. 9; 28 Ch. D. 586.]

(l) *Palairot v. Carew*, 32 Beav. 568.

(m) See *Oliver v. Court*, 8 Price, 165; *Campbell v. Walker*, 5 Ves. 680; *Conolly v. Parsons*, 3 Ves. 628, note; Sugd. Vend. & Purch. 55, 11th edit.

(n) *Stevens v. Austen*, 7 Jur. N. S. 873.

(o) *Oliver v. Court*, 8 Price, 166, *per* Lord Chief Baron Richards; *In re Chertsey Market*, 6 Price, 265, *per eundem*.

(p) *Buxton v. Buxton*, 1 M. & Cr. 80; *Garrett v. Noble*, 6 Sim. 504; *Fry v. Fry*, 27 Beav. 144; and see *Fitzgerald v. Jervoise*, 5 Mad. 25; *Vickers v. Scott*, 3 M. & K. 500; *Sculthorpe v. Tipper*, 13 L. R. Eq. 232; *Turner v. Buck*, 18 L. R. Eq. 301.

¹ *Wormeley v. Wormely*, 8 Wheat. 421.

² *Berger v. Duff*, 4 Johns. Ch. 368.

not authorize the trustees as between them and their *cestuis que trust* to postpone the sale arbitrarily to an indefinite period. The trustees cannot by such postponement vary the relative rights of the tenant for life and remaindermen, and so interfere with the settlor's intention (*q*). If trustees for a length of time, as for twenty years, neglect without any sufficient reason to sell, they will be answerable for any depreciation, and be decreed to account for interest instead of rents (*r*).

8. If the trust be "with all convenient speed and *within five years*," to sell the estate and apply the funds in payment of debts, &c., the proviso as to the five years is considered as directory only, and the trustees can sell and make a good title after the lapse of that period. The Court could scarcely impute to the settlor the intention that the sale at the end of the five years should be made * by the Court, which [* 425] would be the case if the power in the trustees were extinguished (*s*).¹

Trust to sell within a limited period.

[9. A trust for sale is not put an end to by reason of all the persons beneficially interested becoming *sui juris*, for any one of the *cestuis que trust* has a right to insist on the trust being carried out, but if they all agree to take the property as realty, the trust for sale is extinguished (*t*).]

[*Cestuis que trust* all *sui juris*.]

10. In a case where the trustees had endeavored for some time to sell, and not having succeeded, they agreed to execute a *lease*, the Court, on a bill filed by the trustees, to compel specific performance, refused to decree the lease, as the trust for sale did not *prima facie* imply a power to grant leases (*u*).² And so *executors* who are *quasi* trustees for sale, would, under special circumstances only, be justified in granting a lease (*v*); for such an act is not regularly within their province, and it is incumbent on the persons taking a

Trustees for sale may not grant leases.

(*q*) See *Walker v. Shore*, 19 Ves. 391; *Hawkins v. Chappel*, 1 Atk. 623.

(*r*) *Fry v. Fry*, 27 Beav. 144; *Pattenden v. Hobson*, 1 Eq. Rep. 28.

(*s*) *Pearce v. Gardner*, 10 Hare, 287; and see *Cuff v. Hall*, 1 Jur. N. S. 973; *De la Salle v. Moorat*, 11 L. R. Eq. 8; [*Edwards v. Edmunds*, 34 L. T. N. S. 522.]

[(*t*) *Biggs v. Peacock*, 22 Ch. D. 284; *Re Tweedie and Miles*, 27 Ch. D. 315.]

(*u*) *Evans v. Jackson*, 8 Sim. 217.

(*v*) *Hackett v. M'Namara*, Ll. & G. Rep. t. Plunket, 283.

¹ *Shatter's App.* 4 Pa. St. 83; *Smith v. Keaney*, 33 Texas, 283.

² *Hubbard v. Elmer*, 7 Wend. 446.

* 4 LAW OF TRUSTS.

lease from them to show that it was called for by the interests of the parties entitled to the property (*w*).¹

[May not
give option
to purchase.]

[11. And executors and administrators equally with trustees cannot bind the trust estate by a proviso in a lease that the lessee shall during the term have an option of purchasing the property at a fixed price (*x*); for it is the duty of the trustees to exercise their discretion at the time of sale as to whether the terms are in the circumstances as then existing beneficial to the *cestuis que trust*. And on the same principle a covenant by a trustee in a lease to renew on the payment of a fixed fine was held to be a breach of trust and not enforceable by the lessee (*y*).]

Trust for sale
will not in
general
authorize a
mortgage.

12. A trust for sale, if there be nothing to negative the settlor's intention to convert the estate absolutely, will not authorize the trustees to execute a mortgage (*z*).² But where an estate is devised to trustees, *charged with debts*, and subject thereto, upon trust for certain parties, so that a sale, though it may be required, is not the testator's object, the trustees may, for the purpose of paying the debts, more properly mortgage than [* 426] sell (*a*).³ "A power of sale out * and out," observed Lord St. Leonards, "for a purpose or with an object beyond the raising of a particular charge, does not authorize a mortgage: but where it is for raising a particular charge, and the estate is settled subject to that charge, then it may be proper, under the circumstances, to raise the money by mortgage, and the Court will support it as a conditional sale, as something

(*w*) Keating v. Keating, L.L. & G. Rep. t. Sugden, 133; [Oceanic Steam Navigation Company v. Sutherland, 16 Ch. D. 236.]

(*x*) Oceanic Steam Navigation Company v. Sutherland, 16 Ch. D. 236; Clay v. Rufford, 5 De G. & Sm. 768.]

(*y*) Bellringer v. Blgrave, 1 De G. & Sm. 63.]

(*z*) Haldenby v. Spofforth, 1 Beav. 390; Stroughill v. Anstey, 1 De G. M. & G. 635; Page v. Cooper, 16 Beav. 396; Devaynes v. Robinson, 24 Beav. 86.

(*a*) Ball v. Harris, 4 M. & Cr. 264.

¹ Williams v. Woodward 2 Wend. 487; Blake v. Sanderson, 1 Gray, 333.

² Wood v. Goodridge, 6 Cush. 117; Williams v. Woodward, 2 Wend. 487; Phine v. Barnes, 100 Mass. 470; Hubbard v. German Cath. Cong. 34 Io. 31; Hault v. Townshend, 31 Md. 338; Ferry v. Laible, 31 N. J. Eq. 567; Stokes v. Paine, 58 Miss. 614; In Pennsylvania however, a power of sale has been held to imply a power to mortgage. Zane v. Kennedy, 73 Pa. St. 183; Goehring's App. 81 Pa. St. 284.

³ Lancaster v. Dolan, 1 Rawle, 231; Duval's App. 38 Pa. St. 112; Williams v. Woodward, 2 Wend. 492.

within the power, and as a proper mode of raising the money" (b).¹

13. A testator devised an estate to trustees upon trust to apply the rents for fifteen years in payment of incumbrances charged thereon, and if, for any reason whatever, in the *opinion of the trustees* a sale should become necessary, "they were authorized to sell." The purchaser objected that the amount of the incumbrances would not justify a sale of the whole estate, but it was held that the power of sale depended on the opinion of the trustees, and the fact that they thought it necessary would be evidenced by the conveyance (c).

Where the power is left to the discretion of the trustees the purchaser cannot question the exercise of the discretion.

14. A trust to raise money by *mortgage* will not authorize a sale, though the latter may be more beneficial to the estate; and the Court itself has no jurisdiction to substitute a sale for a mortgage (d).

A trust to mortgage will not authorize a sale.

15. It was held by V. C. Kindersley, that in the absence of any special direction a mere power to *mortgage* does not authorize a mortgage *with a power of sale*, since how can a trustee who has not in himself even any power to sell give authority to another to sell (e). But according to V. C. Malins a direction to trustees to raise money "by mortgage *in such a manner as they may think fit*," authorizes a mortgage with a power of sale (f), and according to Lord Romilly, M. R., a power to raise money by *sale or mortgage* justifies a mortgage with a power of sale (g). There is no doubt a conflict of authority. If a mortgage *per se* does not imply a power of sale, a direction to sell or mortgage will not carry the matter further, for the trustee has no power to delegate his authority to sell, and if the broad general principle be adopted that the power of sale is an ordinary incident to the mortgage, the logical result would be that a power of mortgaging alone authorizes a mortgage with a power of sale. Of course where the *Court* has a jurisdiction to raise money * out of an estate, as for payment of [* 427] debts, it may either direct a sale or a mortgage with a

Powers of sale.

(b) *Stroughill v. Anstey*, 1 De G. M. & G. 645; *Page v. Cooper*, 16 Beav. 400.

(c) *Rendlesham v. Meux*, 14 Sim. 249.

(d) *Drake v. Whitmore*, 5 De G. & Sm. 619.

(e) *Clarke v. Royal Panopticon*, 4 Drew. 26; but see *Russell v. Plaice*, 18 Beav. 21; *Leigh v. Lloyd*, 2 De G. J. & S. 330; 35 Beav. 455; *Re Chawner's Will*, 8 L. R. Eq. 569.

(f) *Re Chawner's Will*, 8 L. R. Eq. 569.

(g) *Bridges v. Longman*, 24 Beav. 27; and see *Cook v. Dawson*, 29 Beav. 128.

¹ *Lavitt v. Pell*, 25 N. Y. 474.

power of sale (*h*), and an executor is, for the purposes of paying debts, regarded as the absolute owner, and may therefore either sell or mortgage or give a mortgage with a power of sale (*i*).¹ [Since the conveyancing and Law of Property Act, 1881, under which mortgagees, where the mortgage is made by deed, have by virtue of the Act a power of sale vested in them, the point has become practically unimportant; but it is conceived that, as by the 66th section of the Act, a power of sale in the form contained in the Act is in effect declared to be a proper power to be contained in a mortgage deed, it cannot be contended that a power to mortgage does not now authorize the insertion of a power of sale in the mortgage deed.]

Sale of equity of redemption.

16. If an equity of redemption be vested in trustees for sale with a direction to apply the proceeds in discharge of the mortgage and pay the balance to the settlor, the trustees, notwithstanding the direction to discharge the mortgage, may sell subject to it (*k*)².

A power of sale will not authorize a partition.

17. A power to trustees to sell will not authorize a partition,³ and it was long considered doubtful whether a power to sell and exchange would do so (*l*), [but it has recently been decided that under the usual power of sale or exchange a partition can be effected (*m*), and

Effect of usual power of sale in settlements.

18. Prior to the Settled Land Act, 1882,] in settlements of real estates a power of sale was usually given to trustees, to be exercised with the consent of the tenant for life, with a direction to lay out the proceeds, with all convenient speed, in another purchase, and in the meantime to invest them upon some proper security. For determining upon what occasions the trustees would be justified in proceeding to a sale, it will be proper to notice, in the words of Lord Eldon, the intention of the settlement in so framing the power:—

(*h*) Selby v. Cooling, 23 Beav. 418.

(*i*) Cruikshank v. Duffin, 13 L. R. Eq. 555; and see Earl Vane v. Rigden, 5 L. R. Ch. App. 663.

(*k*) Manser v. Dix, 8 De G. M. & G. 703.

(*l*) [M'Queen v. Farquhar, 11 Ves. 467; Attorney-General v. Hamilton, 1 Madd. 214]; Brassey v. Chalmers, 16 Beav. 223; 4 De G. M. & G. 528; Bradshaw v. Fane, 2 Jur. N. S. 247; 3 Drew. 534.

(*m*) [In re Frith and Osborne, 3 Ch. D. 618, and see Doe v. Spencer, 2 Exch. 752; Abel v. Heathcote, 4 Bro. C. C. 278; 2 Ves. 98.]

¹ King v. Whiton, 15 Wis. 684; Cleveland v. State Bank, 16 Ohio St. 236.

² Fluke v. Fluke, 1 Green, Ch. 478.

³ Woodhull and Longstreet, 3 Harr. 419.

"The object of the sale," he said, "must be to invest the money in the purchase of another estate, to be settled to the same uses, and the trustees are not to be satisfied with probability upon that, but it ought to be with reference to an object at that time supposed practicable, or, at least, this Court would expect some strong purpose of family prudence justifying the conversion, if it is likely to *continue money" (*n*) Sir [* 428] W. Grant is said to have concurred in the same sentiments (*o*), so that clearly the trustees as between them and their *cestuis que trust* would not be justified in selling to gratify the caprice or promote the exclusive interest of the tenant for life. It might happen that particular circumstances might call for an immediate sale, as where an extremely advantageous offer is made, or there is a prospect of great deterioration by abstaining from exercising the power; but, generally speaking, the trustees ought not to convert the estate without having another purchase in view, and then not for the mere purpose of conversion, but in the honest exercise of their discretion, for the benefit of all parties claiming under the settlement (*p*)¹. The power of investing the proceeds upon some security in the meantime was not meant to authorize the *continuance* of the property as *money*, but only to meet the exigencies of particular circumstances, as where the trustees are disappointed of the contemplated new purchase, or the state of the title to the new purchase leads to necessary delay.

19. It is also to be noticed where the lands have been charged by the tenant for life under the *Drainage Acts*, that as the sale can only be made subject to the charge, the exercise of the power will confer a benefit on the tenant for life, for *before* the sale he is bound by the Acts to pay not only the interest on the charge, but also part of the principal, but *after* the sale he becomes under the settlement tenant for life of the whole proceeds.

Effect of the
Drainage
Acts.

[20. Where the power of sale was given to the trustees "at the request and by the direction of" the tenant for life, the Court refused to restrain a sale although no immediate reinvestment was contemplated, being of opinion that the tenant for life had a right to call upon

[At the request and by the direction of tenant for life.]

(*n*) *Mortlock v. Buller*, 10 Ves. 308, 309.

(*o*) *Lord Mahon v. Earl of Stanhope*, cited 2 Sug. Pow. 412.

(*p*) See *Cowgill v. Lord Oxmantown*, 3 Y. & C. 369; *Watts v. Girdlestone*, 6 Beav. 188; *Marshall v. Sladden*, 4 De G. & Sm. 468; [*Jaques v. Wilson*, W. N. 1880, p. 83.]

¹ *Wormley v. Wormley*, 8 Wheat. 421.

the trustees to sell, and that they had no right to refuse his request (*q*).

[Settled
Land Act.]

21. Under the Settled Land Act, 1882, the power of sale is given to the tenant for life, and may be exercised by him without reference to any prospective reinvestment of the purchase-money in the purchase of another estate. In fact there is no restriction whatever in the Act on his power of sale, which, subject to the giving of certain notices (*r*), may be exercised by him, on any grounds which he thinks sufficient, without any liability [* 429] on his part, to justify * the grounds, and without any power in the trustees of the settlement or in the Court to interfere with his power of sale so long as the same is honestly and properly exercised (*s*). It must however be borne in mind that the tenant for life is under the 53rd section "in relation to the exercise of any power under the Act, to be deemed in the position and to have the duties and liabilities of a trustee for all parties entitled under the settlement," and it is conceived that the effect of this is to put the tenant for life in the position of a trustee with a power of sale exercisable in all respects at his absolute discretion, and to make the exercise of the power subject to the control of the Court in all cases in which the tenant for life is influenced by dishonest or improper motives (*t*).

22. The result of the late Act is that it is now unnecessary and unadvisable to insert a power of sale in a family settlement of real estate; but the powers arising under the Act which are sufficient for any ordinary case should be relied on (*u*).

[Sale with
consent.]

23. Where trustees were empowered to sell and enfranchise with the consent of the person for the time being entitled as beneficial tenant for life, and the will contained a direction that no repurchase or reinvestment should be made while there should be any person entitled as beneficial tenant for life or tenant in tail in possession and of the age of twenty-one years, without the previous consent of such person, it was held that

[*q*] *Thomas v. Williams*, 24 Ch. D. 558.]

[*r*] 45 & 46 Vict. c. 38, s. 45; 47 & 48 Vict. c. 18, s. 5.]

[*s*] *Wheelwright v. Walker*, 23 Ch. D. 752.]

[*t*] As to the control of the Court over the exercise of powers, see *post*. chap. xxiii, s. 2. See also the observations in *Wheelwright v. Walker*, 23 Ch. D. 759, which seem not to give full effect to sect. 53 of the Settled Land Act, 1882.]

[*u*] As to the powers of a tenant for life under the Act, and the effect of the Act generally, see *post*, chap. xxii.]

the trustees could during the infancy of a tenant in tail in possession make a good title under the power (v).

24. Trustees for sale at the *request* and by the *direction* of another party, to be testified in writing, &c., cannot obtain a decree for specific performance without first proving that the contract was entered into at such request and by such direction, and that such request and direction have, either before or since the contract, been testified by the requisite writing (w). Nor if trustees have a power of selling or leasing at the *written request* of another, will the Court enforce a contract without such request, though it is alleged that there was part performance by the trustees and by the person * whose request was necessary, and that it is [* 430] therefore a case where a mere *parol* contract is sufficient (x).

25. If an estate be vested in trustees upon trust for A. for life, and on the *decease* of A. to sell, the trustees have no power to sell during the life of A., however beneficial it may be to the parties interested in the trust (y). But if an estate be devised to A. for life, and after her decease to trustees upon trust to sell "as soon as conveniently may be after the *testator's* decease," the trustees, with the concurrence of A., can make a good title (z); and if the tenant for life and the trustees in remainder sell for one entire sum, it has been held that the purchaser will get a good title, and the tenant for life and the trustees may agree as amongst themselves how the purchase money is to be apportioned, or if they cannot agree it will be apportioned by the Court (a); [and the same principle was applied where the trustees of a reversion expectant on a lease concurred with the owner of the lease in selling the fee (b).] And generally trustees for sale of any aliquot part of an estate may join in a sale of the whole estate for one entire sum, and the purchase money, as amongst the respective owners, may be left to be ap-

[(v) *Re* Sir T. Neave and Chapman and Wren, 49 L. J. N. S. Ch. 642.]

(w) *Adams v. Broke*, 1 Y. & C. C. C. 627; *Sykes v. Sheard*, 33 Beav. 114; see the decree at the foot of the case; and see *Blackwood v. Borrowes*, 2 Conn. & Laws. 459.

(x) *Phillips v. Edwards*, 33 Beav. 440.

(y) *Johnstone v. Baber*, 8 Beav. 233; *Blacklow v. Laws*, 2 Hare, 40; *Mosley v. Hide*, 17 Q. B. 91; *Want v. Stallibrass*, 8 L. R. Ex. 175.

(z) *Mills v. Dugmore*, 30 Beav. 104.

(a) *Clark v. Seymour*, 7 Sim. 67; [and see *Re Cooper and Allen's Contract*, 4 Ch. D. 802.]

[(b) *Morris v. Debenham*, 2 Ch. D. 540.]

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portioned as before (c); and where a testator's estate was under administration by the Court, and a house, part of that estate, was put up for sale with another house which was comprised in the testator's marriage settlement, in one lot, and the trustees of the settlement had leave to attend, it was held that as the sale of the entirety was beneficial, a good title could be made, and that the purchase money could be apportioned in chambers (d). But a purchaser cannot be compelled to accept such a title if the separate interests of the *cestuis que trust* in such a joint sale be not brought to the sale with every advantage, or if the nature of the case be such that the purchase-money will not admit of apportionment upon any intelligible principle (e).

Trust for
sale survives.

26. Where an estate is vested in several trustees upon trust to raise a sum by sale or mortgage, and one of the trustees dies, the survivors or survivor may sell [* 431] or mortgage, unless there be words in * the settlement which expressly declare that the trust shall not be exercised by the *survivors or survivor*, for the execution of a trust is not regarded in the same light as that of a power; but the presumption is that, as the estate, so the discretionary part of the trust passes to the survivors or survivor (f). The objection is sometimes taken that where there is a power of appointment of new trustees, and one of the trustees has died and a new trustee has not been substituted, the survivor is incompetent to execute a valid conveyance. But though a proviso for appointment of a new trustees may certainly be so framed that the execution of the trust should, until a new trustee has been substituted, remain in suspense (g), yet the clause, as usually penned in settlement [and as framed in the Conveyancing and Law of Property Act, 1881, s. 31,] is considered by the Courts to be merely of a directory character (h).

Though
there be a
power to ap-
point new
trustees.

Power of sale
in a mort-
gage.

27. In a *mortgage* to two persons to secure a *joint* advance with a *power of sale* to "them, their heirs and assigns," if one dies, the survivor may sell (i); and in a mortgage to A. in fee, with a power of sale to him,

(c) See *M'Carogher v. Whieldon*, 34 Beav. 107.

(d) *Cavendish v. Cavendish*, 10 L. R. Ch. App. 319. [As to the power of trustees to grant a lease of two estates held upon different trusts, see *Tolson v. Sheard*, 5 Ch. D. 19.]

(e) *Rede v. Oakes*, 32 Beav. 555; 10 Jur. N. S. 1246; [4 De G. J. & S. 505; See *Re Cooper and Allen's Contract*, 4 Ch. D. 802.]

(f) *Lane v. Debenham*, 11 Hare, 188.

(g) See *Foley v. Wontner*, 2 J. & W. 246.

(h) See *supra*, pp. 262, 263.

(i) *Hind v. Poole*, 1 K. & J. 383.

"his heirs, executors, administrators or assigns," the administrator of the assign of A., though the legal estate of the lands be not in himself, but in a trustee for him under a conveyance from the heir of the assign, is, together with such trustee, an assign within the meaning of the power and can therefore sell (*j*). And it does not vitiate the sale, that part of the purchase-money is left on mortgage of the estate, but the mortgagee is answerable for the whole amount to the mortgagor (*k*).

28. By 23 & 24 Vict. c. 145, as to mortgages *by deed* 23 & 24 Vict. created since 28th August, 1860, and where the security c. 145.

does not speak to the contrary, any mortgagee, though his security contain no power of sale, may, when the principal sum has been in arrear for twelve months, or the interest for six months, or there has been any default by the mortgagor in insuring, proceed to a sale, after six months' notice, and sign a valid receipt for the purchase money (*l*). [But this has been repealed as to instruments executed after the 31st of December, 1881, [44 & 45 Vict. c. 41.] and its place supplied as to such instruments by the Conveyancing and Law of Property Act, 1881, which gives to * mortgagees of property generally, [* 432] whether real or personal; where the mortgage is by deed, and no contrary intention is expressed in the instrument, power to sell the mortgaged property when the mortgage money has become due; but the power is not to be exercised unless and until—

(1). Notice requiring payment of the mortgage money has been given, and default made in payment for three month; or

(2). Some interest has been in arrear for two months after becoming due; or

(3). There has been a breach on the part of the mortgagor of some provision contained in the mortgage deed or in the Act other than and besides a covenant for payment of the mortgage money or interest thereon (*m*).]

29. As a trustee, like any ordinary vendor, is bound Trustees to make the purchaser a good title (*n*), it would be must show a prudent before proceeding to the execution of the trust, good title. to take the opinion of counsel whether a good title can

(*j*) *Saloway v. Strawbridge*, 1 K. & J. 371; 7 De G. M. & G. 594.

(*k*) *Davey v. Durrant*, 1 De G. & J. 535; [*Bettyes v. Maynard*, 49 L. T. N. S. 389; reversing S. C. 46 L. T. N. S. 766.]

(*l*) 23 & 24 Vict. c. 145, ss. 11-16; and s. 34.

[(*m*) 44 & 45 Vict. c. 41, ss. 19, 20, 71.]

(*n*) *White v. Foljambe*, 11 Ves. 343, 345, *per* Lord Eldon; and see *M'Donald v. Hanson*, 12 Ves. 277.

be deduced. Should the contract for sale be unconditional and the title prove bad, the purchaser in a suit for specific performance would have his costs against the trustee (*o*), though the trustee, where his conduct was excusable, might charge them upon the trust estate under the head of expenses.

Timber.

30. If trustees have a *power of sale only*, they cannot sell the estate separate from the *timber* standing upon it, though the tenant for life be without impeachment of waste, and might have cut the timber previously to the sale; and a sale so effected is absolutely void (*p*), unless it be effected subsequently to 13th August, 1859, when it may be confirmed by means of a legislative enactment in that behalf (*q*).

Minerals.

25 & 26 Vict.
c. 108.

31. It is conceived that no distinction exists between timber and *minerals*, for both until severed form an integral part of the property. And it was accordingly, before the late Act, decided that the surface could not [* 493] be sold apart from the minerals (*r*)¹. * But now, by 25 & 26 Vict. c. 108, trustees and other persons (*s*) are authorized, with the previous *sanction of the Court of Chancery*, to be obtained on petition in a summary way (*t*), to sell the *surface* separate from the

(*o*) *Edwards v. Harvey*, G. Coop. 40.

(*p*) *Cholmeley v. Paxton*, 3 Bing. 207; 5 Bing. 48; S. C. nom. *Cockerell v. Cholmeley*, 10 B. & C. 654; 3 Russ. 565; 1 R. & M. 418; 1 Cl. & Fin. 60.

(*q*) 23 & 23 Vict. c. 35. s. 13. [As to the power of a tenant for life impeachable for waste with the consent of the trustees of the settlement to cut and sell timber under the Settled Land Act, 1882, see sect. 35 of that Act.]

(*r*) *Buckley v. Howell*, 29 Beav. 546; as to sales under the Settled Estates Act, see *Re Mallins*, 3 Giff. 126; [*Re Milward's Estate*, 6 L. R. Eq. 248.] In settling lands where there are minerals, it may be convenient to enable the trustees for sale "as to any of the premises under which minerals may lie, to sell the surface apart from the minerals, or to sell the minerals together with, or apart from, the surface, and to grant or reserve such rights of way as in-stroke or out-stroke, and any other easements in, upon, over, or under any of the said premises as may be necessary or desirable for the winning, working, storing, selling, and carrying away of any such minerals."

(*s*) And "other persons" has been held to comprise mortgagees; *Re Beaumont's Mortgage Trusts*, 12 L. R. Eq. 86; *Re Wilkinson's Mortgaged Estates*, 13 L. R. Eq. 634.

(*t*) Where the power of sale is in the trustees, with the consent of the tenant for life, a petition by the trustees must be served on the tenant for life, but not on the remainderman, *Re Pryse's Estate*, 10 L. R. Eq. 531; [*Re Nagle's Trusts*, 6 Ch. D. 104;] and the sanction of the Court being required for the protection of the beneficiaries, they must be served; *Re Brown's Trust Estate*, 9 Jur. N. S. 349; *Re Palmer's Will*, 13 L. R. Eq. 408.

¹ *Cadwalader's App.* 64 Pa. St. 293.

minerals, and the *minerals* separate from the *surface*, and such sales for the time past, where they have not been the subject of litigation, either concluded or pending, are confirmed.

[32. In the case of a sale by the tenant for life under the Settled Land Act, 1882, the sale may be made either of land with or without an exception or reservation of all or any of the mines and minerals therein, or of any mines and minerals, and in any such case with or without a grant or reservation of powers of working, wayleaves or rights of way, rights of water and drainage, and other powers, easements, rights and privileges for or incident to or connected with mining purposes, in relation to the settled land, or any other land (*u*). During the minority of the tenant for life, or person having the powers of a tenant for life, this power may be exercised by the persons who are trustees of the settlement for the purposes of the Act, if any, and if there are none then by such persons as the Court may direct (*v*).]

33. If lands be devised to trustees in trust to sell for payment of debts, and, subject to that charge, are given to A. for life *without impeachment of waste*, with remainders over, the trustees must not raise the money by a sale of timber, which would be a hardship on the tenant for life, but by a sale of part of the estate itself; and should they have improperly resorted to a fall of timber, the tenant for life would have a charge upon the lands to the amount of the proceeds (*w*). Where the estate is settled the timber cannot be sold separately.

34. If a fund be subject to the ordinary trusts of a marriage settlement, with a power of varying securities and of selling out * any part thereof and in- [* 434] vesting the proceeds on a *purchase of a freehold estate* to be held "upon such trusts as will best and nearest correspond with the trusts thereinbefore declared" of the securities sold out (being trusts for the benefit of the parents and issue), and with a direction that the purchase to be so made shall be "deemed *personal estate* for all the purposes of the settlement and go accordingly," but *without a general receipt clause*, a trust for *reconversion* is implied, and the trustees can sell and sign a valid receipt (*x*). Implied reconversion.

[Trustees of personal estate whose trust authorizes

[*u*] 45 & 46 Vict. c. 38, s. 17.]

[*v*] 45 & 46 Vict. c. 38, s. 60; and see *Re Duke of Newcastle's Estates*, 24 Ch. D. 129.]

(*w*) *Davies v. Wescombe*, 2 Sim. 425.

(*x*) *Tait v. Lathbury*, 35 Beav. 112; and see *Master v. De Croismar*, 11 Beav. 184.

them to call in the trust property and invest the proceeds and vary the investments have an implied power of sale over real estate covenanted to be settled upon similar trusts (y).]

Sale may be
by private
contract or by
auction.

35. The sale may be conducted by *public auction* or *private contract*, as the one or the other mode may be most advantageous, according to the circumstances of the case (z),¹ and of course it is not an essential preliminary to a sale by private contract that the trustees should have previously attempted a sale by auction or even have inserted a public advertisement that the property was for sale (a). And it was held under the old Insolvent Debtors' Act, 7 Geo. 4, c. 57, s. 20, directing a sale by *auction*, that the assignees of the insolvent might sell a real estate by *private contract*, after an ineffectual attempt to dispose of it by auction (b). And, again, though the subsequent Insolvent Debtors' Act, 1 & 2 Vict. c. 110, s. 47, directed the assignees of insolvents to sell "in such manner" as the major part, in value, of the creditors should direct, yet in a case where the creditors resolved that there should be a reserved bidding of 325*l.*, and the assignees sold by auction for 310*l.*, it was held that the clause was merely *directory*, and that the deviation from the resolution of the creditors did not, therefore, vitiate the sale (c).

Sale must
not be dele-
gated.

36. The trustee cannot without responsibility *delegate* the trust for sale (d);² but there seems to be no objec-

[*(y)* *Re Garnett Orme and Hargreaves' Contract*, 25 Ch. D. 595.]

(z) See *Ex parte Dunman*, 2 Rose, 66; *Ex parte Hurly*, 2 D. & C. 631; *Ex parte Ladbroke*, 1 Mont. & A. 384; *Davey v. Durrant*, 1 De G. & J. 535. As to trusts created since 28th Aug. 1860, the legislature has now enacted to this effect, unless the settlement direct to the contrary; 23 & 24 Vict. c. 145, s. 1; [(repealed by 45 & 46 Vict. c. 38, s. 64, as to which see *post*, p. 436, note (a))]; 44 and 45 Vict. c. 41, s. 35.]

(a) See *Davey v. Durrant*, 1 De G. & J. 535; and see *Harper v. Hayes*, 2 Giff. 210; 2 De G. & J. 542.

(b) *Mather v. Priestman*, 9 Sim. 352.

(c) *Wright v. Maunder*, 4 Beav. 512; and see *Sidebotham v. Barrington*, 4 Beav. 110.

(d) *Hardwick v. Mynd*, 1 Anst. 109.

¹ *Crane v. Reeder*, 22 Mich. 339; *Jackson v. Williams*, 50 Ga. 553. The law on this point in Pennsylvania has been brought into conformity with the English rule by Act of Assembly. And private sales made in good faith have been upheld by the court, although the trustees had been directed to sell at auction and although higher bids had been received; *Gibbs v. Cunningham*, 1 Md. Ch. 44; *Gibson's Case*, 1 Bland. 138.

² *Hawley v. James*, 5 Paige, 487; *Black v. Erwin*, Harp. L. 411.

tion to the employment * of agents by him, [* 435] where such a course is conformable to the common usage of business, and the trustee acts as prudently for the *cestuis que trust* as he would have done for himself (e).¹ But an agent for sale must not be allowed to receive the purchase-money; [and an agent should not be employed to do anything out of the ordinary scope of his business; and it has even be held that the trustee's solicitor ought not to choose the valuer, as the choice is a matter on which the discretion of the trustee should be exercised (f).]

37. If the trustee think a sale by *auktion* the more eligible mode, he must see that all proper advertisements are made, and due notice given. It was ruled in an old case (g), that a *cestui que trust* could not, by alleging the want of these preliminary steps, obtain an injunction against the sale; for the trustee being personally responsible to the *cestui que trust* for any consequential damage, the Court, it was said, could not regard it as a case of irreparable injury. But in more recent cases an injunction has been granted, it being the clear duty of the trustee to procure for the *cestuis que trust* the most advantageous sale (h).

If the sale be by auction, proper advertisements must be given.

[38. By the Conveyancing and Law of Property Act, 1881, as to trusts or powers created since 31st December, 1881, and unless the settlement otherwise directs, a trustee may sell, or concur in selling, all or any part of the property either subject to prior charges or not (i).]

[Prior charges.]

39. A trustee may sell subject to any reasonable conditions of sale (k), but would not be justified in clogging the property with restrictions that were evidently uncalled for by the state of the title (l).² [Prior to

Conditions of sale.

(e) *Ex parte Belchier*, Amb. 218; [*Re Speight*, 22 Ch. D. 727; 9 App. Cas. 1;] and see *Ord v. Noel*, 5 Mad. 438; *Rossiter v. Trafalgar Life Assurance Association*, 27 Beav. 377.

[(f) *Fry v. Tapson*, 28 Ch. D. 268.]

(g) *Pechel v. Fowler*, 2 Anst. 549.

(h) *Anon.* Case, 6 Mad. 10; *Blennerhasset v. Day*, 2 B. & B. 133. As to restraining a mortgagee from selling, see *Matthie v. Edwards*, 2 Coll. 465; S. C. on appeal *nomine Jones v. Matthie*, 11 Jur. 504; *Jenkins v. Jones*, 2 Gift. 99.

[(i) 44 & 45 Vict. c. 41, s. 35.]

(k) *Hobson v. Bell*, 2 Beav. 17.

(l) *Wilkins v. Fry*, 2 Rose, 375; S. C. 1 Mer. 268; *Rede v. Oakes*, 4 De G. J. & S. 505, Jur. N. S. 1246; *Dance v. Goldingham*, 8 L. R. Ch. App. 902; [*Dunn v. Flood*, 25 Ch. D. 629; *W. N.* 1885, p. 9]; 28 Ch. D. 586.

¹ *Gillespie v. Smith*, 29 Ill. 473; *Sinclair v. Jackson*, 8 Cow. 582; *Hawley v. James*, 5 Paige, 487.

² The Court will set aside a sale made by trustees under such

the recent enactment it was] usual, in penning a trust for sale, to give express authority to the trustees to insert *special conditions of sale*: [but] as to trusts created after 28th August, 1860, and where the settlement did not otherwise direct, trustees [were authorized by Lord Cranworth's] Act to insert such such *special or other stipulations*, either as to title or evidence of title or otherwise, as they might think fit (*m*). [This enactment [* 436] has since * been repealed (*n*), but its place had been previously supplied by the Conveyancing and Law of Property Act, 1881, s. 35, which provides that, as to trusts for sale and powers of sale created by instruments coming into operation after the 31st day of December, 1881, trustees may, unless the instrument creating the trust or power otherwise provides, sell or concur with any other persons in selling, subject to any such conditions respecting title and evidence of title or other matter, as they think fit (*o*).] But still this would be no warrant for the introduction of stipulations which are plainly not rendered necessary by the state of the title, and are calculated to damp the success of the sale; [as, for instance, a condition limiting the commencement of the title to a recent date where there is no difficulty in giving the earlier title and no special advantage in withholding it, or a condition making all recitals in the abstracted documents conclusive evidence of the matters recited, or a condition that the property is sold subject to the existing tenancies, restrictive covenants, and other incidents of tenure (if any) when there are no such tenancies or covenants (*p*), but a condition limiting the title to ten years in a case where the land was broken up into small lots, and the condition was inserted for the purpose of saving expense, was held by the Court of Appeal, overruling North, J., to be reasonable and proper under the special circumstances (*q*). And] trustees would, it is

(*m*) 23 & 24 Vict. c. 145, s. 2.

[(*n*) 45 & 46 Vict. c. 38, s. 64. The repeal is not to affect the operation, effect, or consequence of any instrument executed or made before the commencement of the Act. The section of Lord Cranworth's Act may therefore be called in aid in cases of settlements executed after 28th Aug. 1860, and prior to the Conveyancing and Law of Property Act, 1881.]

[(*o*) 44 & 45 Vict. c. 41, s. 35].

[(*p*) *Dunn v. Flood*, 25 Ch. D. 629; W. N. 1885, p. 9; 28 Ch. D. 586.]

[(*q*) *Dunn v. Flood*, W. N. 1885, p. 9; 28 Ch. D. 586.]

representation or conditions as tended to prevent competition and to cause a sacrifice of the property. *Barnard v. Duncan*, 38 Mo. 170; *Goodwin v. Mix*. 38 Ill. 115.

conceived, be justified in inserting a condition, now not uncommon, empowering the vendor, if unable, or unwilling, for *reasonable cause*, to remove the purchaser's objection, to cancel the contract. Such a condition may be depreciatory at the sale itself, and yet beneficial in its results (*r*).

[40. If trustees have agreed to sell property subject to conditions of such a nature that the sale could be impeached by the *cestuis que trust*, the Court will not, at the instance of the trustees, enforce the contract against the purchaser (*s*).

41. As a tenant for life selling under the powers of the Settled Land Act, 1882, is by sect. 53, in relation to the exercise of the power to have the duties and liabilities of a trustee, it is conceived * that the [* 437] same rules with regard to depreciatory conditions apply to him as to any other trustee.]

42. There is no rule to prevent the trustees from selling in *lots*, should the auctioneer or other experienced person recommend it as the most advisable course (*t*), and this liberty is now given by express enactment as to trusts created since 28th August, 1860, where the settlement does not direct the contrary (*u*).

[43. A trustee or mortgagee is justified, on the sale of a property of large value, in allowing the custom of auctioneers to accept a cheque in lieu of cash for the deposit to be acted upon, and will not be held guilty of negligence if the cheque be dishonoured (*v*).] [Cheque for deposit.]

44. *Trustees of bankrupts* cannot *buy in* at the auction without the authority of the creditors, and where the assignees had put up the estate in two lots, and bought them in, and afterwards upon a re-sale there was a gain upon one lot and a loss upon the other, the balance upon the whole being in favour of the estate, Lord Eldon compelled the assignees to account for the diminution of price on the one lot, and would not allow them to set off the increase of price on the other lot (*w*).

(*r*) *Falkner v. Equitable Revisionary Society*, 4 Drew. 352.

[(*s*) *Dunn v. Flood*, 25 Ch. D. 629; W. N. 1885, p. 9.

(*t*) See Co. Lit. 113a; *Ord v. Noel*, 5 Mad. 438; *Ex parte Lewis*, 1 Gl. & J. 69.

(*u*) 23 & 24 Vict. c. 145, s. 1. [Repealed by 45 & 46 Vict. c. 38, s. 64; a similar power having been previously given to trustees under instruments coming into operation after 31st December, 1881, by 44 & 45 Vict. c. 41, s. 35. As to the effect of the repealing clause, see p. 436, note (*a*).]

[(*v*) *Farrer v. Lacy Hartland & Co.*, 25 Ch. D. 636.]

(*w*) *Ex parte Lewis*, 1 Gl. & J. 69; and see *Ex parte Buxton*, Id. 355; *Ex parte Baldock*, 2 D. & C. 60; *Ex parte Gover*, 1 De G. 349; *Ex parte Tomkins*, Sugd. V. & P. 815, 14 ed.

It may be thought perhaps that as trustees in bankruptcy act under a statute they have less discretionary power than belongs to ordinary trustees; but in *Taylor v. Tabrum* (x) the same principle was applied to trustees in the proper sense of the word.

By 23 & 24 Vict. c. 145, as to trusts created [after 28th August, 1860, and prior to the repeal of the Act,] and where the settlement does not otherwise direct, trustees may sell at one time or at several times, and may *buy in*, or *rescind* a *private contract*, and resell without being responsible (y).

[By a later Act as to trusts or powers created since 31st December, 1881, where the settlement does not otherwise direct, trustees may "vary any contract for sale," and may "buy in at any auction or rescind any contract for sale and resell without being answerable for any loss (z).]

37 & 38 Vict.
c. 78.

[* 438] * 45. By the Vendor and Purchaser Act, 1874 (a), it is enacted, by the *first* section, that as to any contract "made *after* 31st December, 1874, and subject to any stipulation to the contrary, *forty* years shall be substituted as the period of commencement of title which a purchaser may require in place of *sixty* years, the present period of such commencement; nevertheless earlier title than forty years may be required in cases similar to those in which earlier title than sixty years may now be required.

And the *second* section (as to any contract made *after* 31st December, 1874, and subject to any stipulation to the contrary), enacts:—

(1). That "under a contract to grant or assign a *term of years*, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the *freehold*."

(2). That recitals, statements and descriptions of facts, matters, and parties in instruments twenty years old "shall, unless and except so far as they shall be *proved* to be *inaccurate*, be taken to be sufficient evidence of the truths of such facts, matters and descriptions."

(3). That "the inability of the vendor to furnish the purchaser with a *legal covenant*" for production of

(x) 6 Sim. 281; see *Ord v. Noel*, 5 Mad. 440; *Conolly v. Parsons*, 3 Ves. 628, note.

(y) 23 & 24 Vict. c. 145, ss. 1 and 2. [Since repealed; see *supra*, note (b), and p. 436, note (a).]

[(z) 44 & 45 Vict. c. 41, s. 35.]

(a) 37 & 38 Vict. c. 78.

documents shall not be an objection to the title, if "the purchaser will, on completion of the contract, have an *equitable right* to the production."

(4). That "such covenants for production as the purchaser can and shall require, shall be furnished at *his* expense, and the *vendor* shall bear the expense of perusal and execution on behalf of and by himself, and on behalf of and by necessary parties other than the purchaser."

(5). That "where the vendor retains *any part* of an estate to which any documents of title relate, he shall be entitled to *retain* such documents."

By the *third* section, it is enacted that "*trustees* who are either vendors or purchasers may sell or buy without excluding the operation of the *second* section."

This express reference to the *second* section, suggests a doubt whether by implication trustees were meant to be excluded from the benefit of the *first* section. It is conceived, however, that no such distinction was intended, and that trustees who buy or sell may take advantage of the general enactment contained in the *first* section.

[46. The 3rd section of the Conveyancing and Law [44 & 45 of Property * Act, 1881, enacts (as to any [* 439] Vict. c. 41.] sale made after the 31st December, 1881, and subject to any stipulation to the contrary in the contract of sale)—

(1). That "under a contract to *sell and assign* a term of years derived out of a leasehold interest in land, the intended assign shall not have the right to call for the title to the *leasehold* reversion."

(2). That "where land of copyhold or customary tenure has been converted into freehold by enfranchisement, then under a contract to sell and convey the freehold, the purchaser shall not have the right to call for the title to make the enfranchisement."

(3). That a purchaser shall not require the production, or any abstract or copy of any document "dated or made before the time prescribed by law, or stipulated for commencement of the title, even though the same creates a power subsequently exercised" by an abstracted instrument, or "require any information or make any requisition, objection, or inquiry with respect to any such deed, will or document, or the title prior to that time, notwithstanding that any such deed, will or other document, or that prior title is recited, covenanted to be produced or noticed; and he shall assume, unless the contrary appears, that the recitals, contained in

[44 & 45
Vict. c. 41.]

the abstracted instruments, of any document forming part of that prior title are correct, and give all the material contents of the document so recited, and that every document so recited was duly executed by all necessary parties, and perfected if and as required by fine, recovery, acknowledgement, inrollment or otherwise."

(4). That "where land sold is held by lease (not including underlease), the purchaser shall assume, unless the contrary appears, that the lease was duly granted; and on production of the receipt for the last payment due for rent under the lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the lease have been duly performed and observed up to the date of actual completion."

(5). That "where land sold is held by under-lease, the purchaser shall assume, unless the contrary appears, that the under-lease and every superior lease were duly granted; and, on production of the receipt for the last payment due for rent under the under-lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the under-lease have been duly performed and observed up to the date of actual completion of the purchase, and * further that all rent due under every superior lease, and all the covenants and provisions of every superior lease, have been paid and duly performed and observed up to that date."

(6). That "on a sale of any property, the expenses of the production and inspection of all documents, not in the vendor's possession, and the expenses of all journeys incidental to such production or inspection, and the expenses of searching for, procuring, making, verifying and producing all certificates, declarations, evidences and information not in the vendor's possession, and all copies or abstracts of, or extracts from, any documents not in the vendor's possession," if required by a purchaser for any purpose, shall be borne by him (b); "and where the vendor retains possession of any document, the expenses of making any copy thereof, at-

[*(b)* It has been held that under this section the purchaser must bear the expense of procuring and making an abstract of any deed not in the vendor's possession of which he requires an abstract, even though it forms part of the title which the vendor is bound to adduce, and the vendor is in a position to compel its production: *Re Johnson and Tustin*, 28 Ch. D. 84, reversed on appeal, W. N. 1885, p. 140.

tested or unattested, which a purchaser requires to be delivered to him, shall be borne by that purchaser."

(7). That "on a sale of any property in lots, a purchaser of two or more lots, held wholly or partly under the same title, shall not have a right to more than one abstract of the common title, except at his own expense."

And by the 13th section, "on a contract to grant a lease for a term of years, to be derived out of a leasehold interest with a leasehold reversion, the intended lessee shall not have the right to call for the title to that reversion."

And by the 66th section, trustees and their solicitors are exonerated from all liability for omitting to exclude the application of the above-mentioned stipulations to any contract they may enter into, but nothing in the act is to make the adoption in connection with any contract of any further or other stipulations improper.]

47. Trustees for sale may do all reasonable acts Clearing the title which they are professionally advised are proper for the purpose of clearing the title and completing the sale (c).

48. Trustees for sale who are to stand possessed of Succession the proceeds upon trust for one person for life with re- duty. mainder to another, can, whether the sale be or not exercisable with the consent of the tenant for life or of the successor, *i.e.*, the remainderman, give a good title to the purchaser free from *succession duty*; for the duty * attaches on the interest of the successor, *i.e.*, [* 441] the money in the hands of the trustees who are responsible, and the sale is by a title which is paramount to the successor's interest; and if the sale is to be by *consent*, the power of selling free from the duty is by the act not to be thereby prejudiced (d). So trustees for sale who are to stand possessed of the proceeds to pay legacies can pass the estate free from duty, for the succession duty does not attach where legacy duty is payable (e), and the legacy duty is not a charge on the estate, but is payable in respect of the proceeds in the hands of the trustees (f).

49. The Court will not enforce a contract against Hardship. trustees where it presses with extreme *hardship*. Thus, where trustees, not being apprised of the real amount

(c) *Forshaw v. Higginson*, 8 De G. M. & G. 827.

(d) 16 & 17 Vict. c. 51, ss. 42, 44; see *Harding v. Harding*, 2 Giff. 597; *Hobson v. Neale*, 8 Exch. 368; *Earl Howe v. Earl of Lichfield*, 2 L. R. Ch. App. 155; *Dugdale v. Meadows*, 9 L. R. Eq. 212, affirmed on app. 6 L. R. Ch. App. 501.

(e) As to leaseholds, see 16 & 17 Vict. c. 51, ss. 1 and 19.

(f) 16 & 17 Vict. c. 51, s. 18.

of the incumbrances upon an estate, entered into a personal engagement with the purchaser to clear off all incumbrances, the Court would not compel the trustees to fulfil their contract, but left the parties to law (*g*), and the bill was dismissed without costs (*h*).

Letting into possession.

50. The purchaser, after the contract, should not be let into *possession* of the estate until the completion of the sale by payment of the full purchase-money (*i*).

Of "granting" in the operative part of the conveyance.

51. Formerly, in drawing the conveyance, the word "*grant*" being commonly (though erroneously) supposed to contain a warranty (*k*), the trustee, instead of "*granting, bargaining, selling, and releasing,*" was often, from extra caution, made to "*bargain, sell, and release,*" with the omission of the word "*grant*" (*l*). And still, as formerly, in order to secure the trustees from the possibility of parting with any interest vested in them beneficially, or from being construed to guarantee anything beyond the powers of their trust, it is not unusual to insert in the operative part of the instrument the words "*according to their estate and interest as such trustees.*"

Covenants.

52. A trustee cannot be compelled to enter into any other covenant for *title* than against incumbrances by [* 442] his own acts (*m*).¹ But * it would be prudent

(*g*) *Wedgwood v. Adams*, 6 Beav. 600.

(*h*) *S. C.* 8 Beav. 103.

(*i*) *Oliver v. Court*, 8 Price, 166, *per* Chief Baron Richards; see *Browell v. Reed*, 1 Hare, 434.

(*k*) See Co. Lit. 384a, note (1), Hargrave and Butler's edit.

(*l*) See now 8 & 9 Vict. c. 106, s. 4.

(*m*) *White v. Foljambe*, 11 Ves. 345, *per* Lord Eldon; *Onslow v. Lord Londesborough*, 10 Hare, 74, *per Cur.*; *Worley v. Framp-ton*, 5 Hare, 560; *Stephens v. Hotham*, 1 K. & J. 571; and *Page v. Broon*, 3 Beav. 36. This is carried to such an extent that, where a lessor grants a lease with a covenant for perpetual renewal, devisees in trust of the lessor, though bound to grant a new lease, are not bound to enter into a similar covenant. In these cases the Court has, in order to secure the lessee without making the trustees personally liable, declared the right of the lessee to a perpetual renewal, and directed the new lease to contain a recital of the old lease, and of the declaration of the Court in obedience to which the trustees purport to demise; *Copper Mining Company v. Beech*, 13 Beav. 478; *Hodges v. Blagrove*, 18 Beav. 405. So, if A. agrees to grant a lease to B. and B. dies, A. can compel the executors of B. to accept the lease, but the lease is so framed that the executors of B. are guarded against all personal liability; *Phillips v. Everard*, 5 Sim. 102; *Stephens v. Hotham*, 1 K. & J. 571; but in the latter case the V. C. added that if the lease were a *beneficial lease claimed by the executors*, that would be a different case, and they must enter into full covenants, p. 580; and see *Staines v. Morris*, 1 V. & B. 12.

¹ *Barnard v. Duncan*, 38 Mo. 170.

in trustees to apprise the public that they sell in that character, that the purchaser may not say he was led to suppose from the advertisements of sale, that the vendors were the beneficial proprietors, and that the contract must, therefore, draw with it the usual incidents, and that the purchaser ought to have the benefit of the ordinary covenants. If the trust for sale is to be exercised with the *consent* [or at the request] of the tenant for life who joins in a sale, he must enter into the usual covenants for title (n).

53. *Mortgagees* with a *power of sale* are regarded as *Mortgagees'* trustees, and covenant only against their own acts (o). *covenants.* To the extent of their mortgage money they are beneficially interested, not however as owners of the estate, but only as incumbrances entitled to a charge.

[54. By the Conveyancing and Law of Property Act, 1881, s. 7, where, in any conveyance made after the 31st December, 1881, any person conveys, and is expressed to convey, as trustee or mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition, or under an order of the Court, a covenant against incumbrances by such person in the form stated in the Act is to be deemed to be included in the conveyance, and is by virtue of the Act to be implied, but such covenant is not to be implied unless the person so conveying is in the conveyance expressed to convey in one of the above capacities.

The benefit of the covenant so implied is to be annexed to and go with the estate of the implied covenantee. A covenant so implied may be varied or extended by deed.]

55. It was laid down by Lord Eldon, that *assignees of bankrupts* * were bound, in case they could [* 443] not deliver up the title deeds, to furnish the purchaser with *attested copies* and to *covenant for production* of the originals, the covenant to be confined to the period during which the assignees should continue in office (p). And trustees, where they retain the title deeds, are equally required to give attested copies, and [either to] covenant for production during the period of their own custody, giving at the same time all such right at law or in equity as they lawfully can to call for the produc-

(n) *Earl Poulett v. Hood*, 5 L. R. Eq. 115; [*Re Sawyer and Baring's Contract*, 53 L. J. N. S. Ch. 1104; 33 W. R. 26.]

(o) *Sugd. Vend. & Pur.* p. 61, 11th edit.

(p) *Ex parte Stuart*, 2 Rose, 215.

tion as against the holder for the time being (*q*), [or else to give a statutory acknowledgment under the recent Act]. It is not easy to suggest a case where upon a sale by trustees the purchaser would not be entitled in equity (which would be sufficient) to call for the production of the deeds, but should there occur a case where the purchaser would not have such a right either at law or in equity, he could not be compelled to complete, but might claim to be discharged from his contract and be paid his costs, which would fall upon the trust estate or the trustees personally, according to the propriety or impropriety of their conduct in proceeding to a sale without guarding themselves by an express condition.

[Statutory
acknowledg-
ment.]

[56. Under the Conveyancing and Law of Property Act, 1881 (*r*), sect. 9, the practice has been introduced of giving an acknowledgment in writing of the right of the purchaser to the production of the documents of title, and to delivery of copies thereof in lieu of the old covenant for production, and with reference to this acknowledgment the following points are noticeable :

[*444] * (1). The person who "retains possession of the documents" (by which, apparently, is meant the person who *has* the documents in his possession, or under his

(*q*) See *Onslow v. Lord Londesborough*, 10 Hare, 74, Sugd. Vend. & Pur. 54, 13th edit.

The following form would, it is conceived, be a proper covenant : "The said A. B., C. D., and E. F., but so as not to render themselves, or any of them, or any of their heirs, executors, or administrators, liable under the present covenant, except so long as they or he respectively shall remain trustees or trustee, and shall as such hold or be entitled to the custody of the deeds and writings hereinafter mentioned, but so nevertheless as to bind so far as can lawfully be done, the holders for the time being of the said deeds and writings, do hereby covenant with the said G. H. that they the said A. B., C. D., and E. F., their *heirs*, *executors*, and *administrators*, shall and will at all times," &c.

Mr. De Morgan has been kind enough to furnish me with the following form, settled by Lord Eldon's own hand, in a case where Lord Eldon and another were devisees in trust under a will : "Each of them the said John Earl of Eldon and E. S. Thurlow, as such devisees in trust as aforesaid, and for such period only as they or either of them, their or either of their heirs, executors, administrators, or assigns, shall have the custody or lawful power over such deeds, evidences and writings, doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree with and to the said J. P., his heirs, appointees, and assigns, so and in such manner as to bind, so far as is practicable, all and every person and persons in whose custody the same deeds, evidences, and writings now are, or at any time hereafter shall be, that," &c.

[(*r*) 44 & 45 Vict. c. 41.]

control), and he only can give the statutory acknowledgment.

(2). The acknowledgment binds the documents in the possession or under the control of every person, who from time to time has such possession or control, but binds the "individual possessor or person so long only as he has possession or control thereof."

(3). The acknowledgment does not confer any right to damages for loss or destruction of or injury to the documents from whatever cause arising.

(4). The acknowledgment satisfies any liability to give a covenant for production and delivery of copies of or extracts from documents.

The obligations and liabilities arising under the statutory acknowledgment correspond with those which arose under the old qualified covenant for production usually entered into by trustees independently of the act, and it is conceived that trustees may safely give the acknowledgment for documents in their possession and that they cannot be required to do more than give this acknowledgment.

57. The same section has introduced the practice of giving an undertaking in writing for safe custody of the documents retained, which "imposes on the person giving it and on every person having possession or control of the documents from time to time, but on each individual possessor or person so long only as he has possession or control thereof, an obligation to keep the documents safe, whole, uncanceled, and undefaced, unless prevented from so doing by fire or other inevitable accident," and under this, trustees who have the custody of documents as to which a former holder has given the statutory undertaking will be personally liable for their safe custody, but it is conceived that they will, in the absence of neglect on their part, be entitled to be recouped out of their trust estate any loss they may suffer in respect of the documents. [Statutory undertaking.]

The undertaking for safe custody involves a personal liability which trustees are not by law bound to take upon themselves and they should accordingly decline to give the statutory undertaking when retaining the possession of documents.]

58. In a sale of *leaseholds* by trustees who take by *assignment* they cannot, in any case, require from a purchaser a covenant of indemnity against a breach of the covenants; for, as regards *themselves*, they took the lease by assignment without personally * cove- [* 445] nanting, and therefore cease to be liable on the assign- Sale of leaseholds.

ment over ; and, as regards a covenant for the protection of the *settlor*, he has become a stranger by the execution of the trust deed, and the trustees could neither, in the absence of an express stipulation, insist upon a benefit to one with whom there is no existing privity, nor, as they are bound to make the sale the most beneficial to the *cestuis que trust*, could they insert a condition in favour of a stranger which might operate as a discouragement to purchasers (*s*).

Executor of
lessee.

59. The *executor* of a *lessee* upon assigning the term would be entitled to such a covenant, his testator's estate being liable under the original covenants of his testator.

Practice of
the Court.

60. Subject to the effect of the Act to be mentioned presently, where a lessee's estate is in course of distribution under the direction of the Court, a portion of the estate is usually reserved for the purpose of forming an indemnity fund against the covenants of the lease (*t*), unless the risk be inconsiderable (*u*). But no indemnity is provided where the testator's estate is not liable, as where the testator himself was not a *lessee*, but the *assignee* of a lease and had entered into no covenants (*v*). And if the executor has assented to the bequest unconditionally, he is held to have waived his claim to indemnity (*w*).

Principle of
practice.

It is difficult to say upon what principle this practice of the Court is based. In some of the older cases the judges seem to have thought that it was to indemnify the *executor*. But as the distribution of the assets is made by the *Court*, and is *not the act of the executor*, it is impossible to maintain that the executor can be personally liable for the debt. In other cases the fund is said to be set apart out of regard to the interests of the lessor. But if the lessor can prove by way of claim in the suit, why, should the Court protect one who will not protect himself ; and if he cannot prove in the

(*s*) See *Wilkins v. Fry*, 1 Mer. 244; *Garratt v. Lancefield*, 2 Jur. N. S. 177.

(*t*) *Cochrane v. Robinson*, 11 Sim. 378 ; *Fletcher v. Stevenson*, 3 Hare, 360 ; *Dobson v. Carpenter*, 12 Beav. 370 ; *Hickling v. Boyer*, 3 Mac. & G. 635 ; *Brewer v. Pocock*, 23 Beav. 310.

(*u*) *Dean v. Allen*, 20 Beav. 1 ; *Brewer v. Pocock*, 23 Beav. 310 ; and see *Reilly v. Reilly*, 34 Beav. 406.

(*v*) *Garratt v. Lancefield*, 2 Jur. N. S. 177. N. B. It may be collected from the judgment that the ordinary covenant to indemnify had not been entered into by the testator on the occasion of the assignment to him.

(*w*) *Shadbolt v. Woodfall*, 2 Coll. 30 ; and see *Smith v. Smith*, 1 Dr. & Sm. 384.

suit (*x*), it seems anomalous that the Court, while it refuses to hear the lessor on the subject of his interest, should deal with the assets behind his back in respect of such interest. The * whole doctrine, said [* 446] V.C. Kindersley, is in a very unsatisfactory state, and does not seem to be founded on sound principle (*y*).

By Lord St. Leonards' Act (22 & 23 Vict. c. 35, s. 22 & 23 Vict. 27), where an *executor* has satisfied all accrued liabilities under a *lease*, and has set apart a fund to answer covenants for expenditure of *fixed sums* on the property (which would not include rents) and assigns the lease to a purchaser, he may distribute the assets without being personally liable to the lessor, who however may still follow the assets in the hands of the recipients.

The practice of the Court for the future has not yet been settled (*z*), but is presumed that where a lease is sold under the direction of the Court, and all existing liabilities have been satisfied, and provision made for future fixed sums covenanted to be laid out on the property, the Court will not think it necessary to protect a lessor, who, as the legislature has now pronounced, cannot under such circumstances claim protection out of Court. In other cases the law will remain as it was, and the general principle would appear to be, that the Court should (not by way of indemnity to the executor, except as to costs of resisting proceedings against him, but *ex debito justitiæ* to a *bona fide* future creditor) set apart a fund where it plainly appears that future liabilities will arise, and that the whole estate itself is not a sufficient security, and the devisee of the lease cannot give adequate security either by personal undertaking or otherwise. [And in recent cases, both in England (*a*) and in Ireland (*b*), the Court has refused to set aside any part of the assets, or to give the executor any further indemnity than that which arises by reason of the administration of the estate by the Court. But where the estate consists to an appreciable extent of leaseholds, which involve a liability in the executor, he

Practice
since the Act.

(*x*) See *King v. Malcott*, 9 Hare, 692; *Re Haytor Granite Company*, 1 L. R. Eq. 11; *Smith v. Smith*, 1 Dr. & Sm. 387.

(*y*) *Smith v. Smith*, 1 Dr. & Sm. 387.

(*z*) *Smith v. Smith*, 1 Dr. & Sm. 384. In *Reilly v. Reilly*, 34 Beav. 406, the Court after a lapse of eight years, and no claim having been made, distributed the fund which had been set apart for an indemnity.

[(*a*) *Re Bosworth*, 29 W. R. 885; 45 L. T. N. S. 136.]

[(*b*) *Buckley v. Nesbitt*, 5 L. R. Ir. 199; *Fitzgerald v. Lonergan*, cited 5 L. R. Ir. 203.]

is entitled as of right to have the estate administered by the Court for his protection (c).]

Assignment
of a *chose in*
action.

61. In the assignment of a *chose in action* [not falling within sect. 25 of the Judicature Act, 1873,] the trustee may be required to give a *power of attorney* to receive the money, and to sue in his name, but this should be accompanied by a proviso that no action or suit shall be commenced unless the assignor consent. [* 447] * or unless the assignee tender a sufficient *indemnity* (d). [But in the case of an absolute assignment by writing within sect. 25, as the assignee can, by giving notice under the Act, acquire the right to sue at law in his own name for the *chose in action*, it is conceived that a trustee could not be compelled to give such a power of attorney.]

Sale by mort-
gagee.

62. In a *mortgage* accompanied with a *power of sale*, the mortgagee, who is a *quasi* trustee, can under the power make a title to the purchaser without the concurrence of the mortgagor (e); and a clause in the mortgage deed that the mortgagor shall, if required, be a party to the conveyance, is considered a contract for the exclusive benefit of the mortgagee, and not as imposing the necessity of procuring the mortgagor's consent of the sale (f).

Whether the
cestuis que
trust should
be parties.

63. If the trustees have a power of signing discharges for the purchase-money, the *cestuis que trust* need not be made parties to the conveyance (g); but as trustees are bound to covenant against their own incumbrances only, the *cestuis que trust*, where it is practicable, are usually made parties to the deed, that the purchaser may have the benefit of their covenants for title according to the extent of their respective interests (h). In sales, however, under the direction of the Court of Chancery, it is the rule *not* to make the *cestuis que trust* parties; for this would involve the necessity of previously inquiring *who* are beneficially interested, and in *what* proportions, whereas it is a common proceeding of the Court to order a sale in the first instance, and leave the rights of the respective parties to be settled by a subsequent adjudication (i).

[(c) *Re Bosworth*, 45 L. T. N. S. 136.]

(d) *Ex parte Little*, 3 Moll. 56.

(e) *Corder v. Morgan*, 18 Ves. 344; *Clay v. Sharpe*, cited Id. 346, note (b); *Alexander v. Crosbie*, 6 Ir. Eq. Rep. 518.

(f) *Corder v. Morgan*, 18 Ves. 347, *per* Sir W. Grant.

(g) See *Binks v. Lord Rokeby*, 2 Mad. 227.

(h) See *Re London Bridge Acts*, 13 Sim. 176.

(i) *Wakeman v. Duchess of Rutland*, 3 Ves. 223, 504; affirmed in D. P. 8 B. P. C. 145; *Colston v. Lilley*, 3 May, 1855, V. C.

[64. Trustees for sale having, under the recent enactments, power to give a complete discharge for the purchase money, are persons "absolutely entitled" within the meaning of the Lands Clauses Consolidation Act, 1845, s. 69, and are entitled to have money in Court, under that Act, paid out to them without bringing their *cestuis que trust* before the Court (*k*). And it makes no difference that the trust for sale is at the request of some other person, where that person concurs with the trustees in asking for the payment to them of the money; *Re Ward's Estates*, 28 Ch. D. 100.

65. The question whether, where trustees have given a written authority to their solicitor or agent to receive the purchase-money, *the purchaser [* 448] can insist upon paying it to the trustees personally, or to their joint account at a bank designated by them, has been the subject of discussion and difference of opinion in the recent case of *Re Bellamy and the Metropolitan Board of Works* (*l*), where it was held by L.J.J. Cotton and Bowen, *diss.* L.J. Baggallay, and overruling Kay, J., that in the absence of "special circumstances which would justify and render it necessary for trustees to grant power to somebody else to receive purchase-money for them," the purchaser could insist on paying his purchase-money in one of the ways suggested; and in a subsequent case, Kay, J., following *Re Bellamy*, held that the purchaser could require *all the trustees* to attend personally to receive the purchase-money, if the money was to be paid to them directly (*m*). Where the circumstances are such as justify trustees in authorizing their solicitor to receive the purchase-money, the 56th section of the Conveyancing and Law of Property Act, 1881 (*n*), will apply, and the production of the deed, as mentioned in that section, by the solicitor will supply the place of a written or express authority to him (*o*); but this sec-

Receipt of
money by
solicitor or
agent.

Stuart at chambers; *Wyman v. Carter*, 12 L. R. Eq. 309; *Re William's Estate*, 5 De G. & Sm. 515; *Cottrell v. Cottrell*, 2 L. R. Eq. 330; and see *Loyd v. Griffith*, 3 Atk. 264; *Freeland v. Pearson*, 7 L. R. Eq. 246.

[*k*] *Re Hobson's Trusts*, 7 Ch. D. 708; *Re Thomas's Settlement*, W. N. 1882, p. 7.]

[*l*] 24 Ch. D. 387; but see] *Robertson v. Armstrong*, 28 Beav. 123; *Hope v. Liddell*, 21 Beav. 202; [*Webb v. Ledsam*, 1 K. & J. 385; *Ferrier v. Ferrier*, 11 L. R. Ir. 56;] and see Sugden's *Vend. & Purch.* 14th ed. 667.

[*m*] *Re Flower and Metropolitan Board of Works*, 27 Ch. D. 592.]

[*n*] 44 & 45 Vict. c. 41, s. 56.]

[*o*] *Re Bellamy and Metropolitan Board of Works*, 24 Ch. D. 387.]

tion has not altered or enlarged the powers of trustees as to giving such authority. In cases not falling within that section] payment to a solicitor or agent *without* a written or other express authority from the trustees, will be no discharge (*p*). However, if the money has been put into a channel by which it may reach the hands of the vendor, and the vendor by his agent delivers a receipt for it to the purchaser, the vendor cannot afterwards throw the loss of the money on the purchaser (*q*).

Deposit money.

66. When trustees sell by auction, the *auctioneer* is their agent, and the trustees will be answerable if they improperly trusted him, or be guilty of any unnecessary delay in recovering the deposit from him (*r*).

Trustees bound to answer enquiries.

67. Trustees for sale for *payment of debts* are of course bound at any time to answer inquiries by the author of the trust, or the persons claiming under him, as to what estates have been sold and what debts have been paid (*s*).

Custody of vouchers.

[* 449] * 68. When the affairs of the trust have been finally settled, the trustees will be entitled to the possession of the *vouchers* as their discharge to the *cestuis que trust*; but the *cestuis que trust* will have a right to the inspection of them (*t*); but not to copies without paying for them.

Land discharged when money raised.

69. The *land* is discharged so soon as the fund has been actually raised, even though the proceeds may be misapplied, and do not reach their proper destination. The remedy of the parties aggrieved is against the trustees personally, without any *lien* upon the estate (*u*). And if a legacy be charged on land (either by the creation of a term or without a term), on the *insufficiency of the personal estate*, and the personal estate was originally sufficient, but becomes insufficient by the *devastavit* of the executor, the land is discharged (*v*), unless

(*p*) *Re Fryer*, 3 K. & J. 317; and see *Viney v. Chaplin*, 2 De G. & J. 468; [*Ex parte Swinbanks*, 11 Ch. D. 525.]

(*q*) *West v. Jones*, 1 Sim. N. S. 205.

(*r*) See *Edmonds v. Peake*, 7 Beav. 239.

(*s*) *Clarke v. Earl of Ormonde*, Jac. 120, *per* Lord Eldon.

(*t*) *Ib. per eundem*.

(*u*) *Anon.* 1 Salk. 153; *Juxon v. Brian*, Pr. Ch. 143; *Carter v. Barnardiston*, 1 P. W. 505; see 518; *Hutchinson v. Massareene*, 2 B. & B. 49; and see *Omerod v. Hardman*, 5 Ves. 736; *Dunch v. Kent*, 1 Vern. 260; *Culpepper v. Aston*, 2 Ch. Ca. 115; *Harrison v. Cage*, 2 Vern. 85; *Hepworth v. Hill*, 30 Beav. 476.

(*v*) *Richardson v. Morton*, 13 L. R. Eq. 123. But see *contra*, *Re Massey*, 14 Ir. Rep. 355.

the devisees of the land are also the persons by whose default the insufficiency arose (*w*).

70. The effect of an *administration suit* upon a trust for sale is that the trustees do not lose their powers, but must exercise them under the direction of the Court, and if they have a *legal power* of sale they can execute it with the sanction of the Court for the purpose of passing the legal estate. But the power, though exercised under the eye of the Court, must of course be pursued as strictly as if there were no suit, and though the trustees may be able to pass the legal estate, yet in equity no good title will be conferred as against *cestui que trust* who was not a party to the suit, or otherwise bound by the exercise of the power. Trustees for sale, with a power of signing receipts, can, if there be no suit, convey the estate, and sign a valid discharge for the purchase-money, but if the Court and not the trustees sell the estate, the purchaser would not acquire a good title as against any *cestui que trust* who was not a party to the suit or not bound by the order. These observations must not be taken to interfere with the legal power of an *executor*, even after decree, to deal with the general personal assets of the testator (*x*).

[71. If in an administration action, or an action for the execution of the trusts of a written instrument, a sale is ordered of any * property vested in any [* 450] executor, administrator or trustee, the conduct of the sale is to be given to such executor, administrator or trustee, unless the Court otherwise directs (*y*).]

SECTION II.

THE POWER OF TRUSTEES TO SIGN DISCHARGES FOR THE PURCHASE-MONEY.

The power of trustees to sign discharges for the purchase-money resolves itself into two questions:—First: Are the trustees justified in making the *sale* at all? and, Secondly: Supposing the sale itself to be proper,

(*w*) *Humble v. Humble*, 2 Jur. 696; *Howard v. Chaffers*, 2 Dr. & Sm. 236.

(*x*) *Berry v. Gibbons*, 8 L. R. Ch. App. 747.

[(*y*) Rules of the Supreme Court Ord. 50, R. 10. Where there were four trustees, and one, who was also tenant for life, was plaintiff, and the others were defendants, the conduct of the sale was given to the three defendant trustees, *Re Gardner*, 48 L. J. N. S. Ch. 644.]

is the purchaser bound to see to the *application* of his purchase-money?

First. Are the trustees justified in proceeding to a sale?

Trust for sale
for payment
of debts.

1. If a testator *devise an estate* to trustees, and direct a sale of it for payment of debts *on the insufficiency of the personal assets*, the trustees *ought* not to dispose of the realty, until it appears that the personal fund is not equal to meet the demands of the creditors. But the point we have here to consider is, how will the *purchaser* be affected, and, as he has no means of investigating the accounts, he is not to be prejudiced should it prove eventually that the personalty is sufficient (*z*). All that could reasonably, and which perhaps *would* be required of him, is, that he should apply to the executor, where the trustee does not sustain that character, and ask if the necessity for the sale has arisen. However, a purchaser is prevented in such a case from dealing exclusively with the trustee out of Court, where a *suit* has been instituted for the administration of the estate (*a*). And the Court itself cannot make a good title where it has been found in the suit that *all the debts have been paid* (*b*).

Power of
sale on
insufficiency
of personal
estate

2. But if a testator give not the *estate* but a *power* [* 451] *of sale* only to * his trustees, and that conditional on the insufficiency of the personal estate, then the purchaser must at his peril ascertain that the power can be exercised (*c*). The difference between a trust and a power is this. In the former case, the trustees, having the legal estate, can transfer it to the purchaser by their ownership; and equity, as the purchaser had no opportunity of discovering the true state of things, will not allow his title to be impeached. But where there is a power merely, the insufficiency of the personal estate is a condition precedent; and if it did not pre-exist in fact, the power never arose, and the purchaser took nothing by the assumed execution of it.

Case of selling more
than the
trust re-
quires.

3. A purchaser is not bound to ascertain whether *more* is offered for sale than is sufficient to answer the purposes of the trust: for how is the purchaser to know

(*z*) *Culpepper v. Aston*, 2 Ch. Ca. 115, *per* Lord Nottingham; *Keane v. Robarts*, 4 Mad. 356, *per* Sir J. Leach; Co. Lit. 290, b, note by Butler, sect. 14; *Shaw v. Borrer*, 1 Keen, 559; *Greetham v. Colton*, 11 Jur. N. S. 848; but see *Fearne's P. W.* 121.

(*a*) *Culpepper v. Aston*, 2 Ch. Ca. 116, 223, *per* Lord Nottingham; and see *Walker v. Smalwood*, Amb. 676; and *supra*.

(*b*) *Carlyon v. Truscott*, 20 L. R. Eq. 348.

(*c*) *Culpepper v. Aston*, 2 Ch. Ca. 221; *Dike v. Ricks*, Cro. Car. 335; S. C. Sir W. Jones, 327.

what exact sum is wanted, without investigating the accounts? And if the sale be by auction the trustees cannot tell *à priori* what the property will fetch. Besides, the trustees are entitled, as incident to their office, to raise their costs and expenses (d).

4. But where a testator directed on the insufficiency of his personal estate a sale in the first instance of estate A., and, should that not answer the purpose, then of estate B., and the trustees, *fifteen* years after the testator's death, contracted for the sale of B. first, and then filed a bill for specific performance, alleging the existence of debts, and that A. was already in mortgage, or otherwise charged to the full value, the Court, considering it was unlikely that creditors would have lain by for so many years, and that the non-existence of debts might therefore be suspected, and that what was ground for suspicion might be deemed notice to a purchaser, determined against the title (e).

Secondly. Supposing the sale to be proper, is the purchaser bound to see to the *application* of his purchase-money?

We must here advert *in limine* to some important recent enactments. By Lord St. Leonards' Act, 22 & 23 Vict. c. 35, s. 23 (passed 13th August, 1859), it is declared that "the *bonâ fide* payment to and the receipt of any person to whom any *purchase* or *mortgage* money shall be payable upon any *express* or *implied* trust shall effectually discharge the person paying the same from seeing to the application or being answerable for the misapplication thereof, unless the contrary shall be expressly declared by the instrument creating the *trust or security." It will be observed, [* 452] 1. That the Act applies not to all monies subject to a trust, but only to monies arising from *sales* and *mortgages* and subject to a trust. 2. That the language of the section, more particularly of the latter part of it is, in the future tense, so that the enactment is not to be retrospective. If future settlors are to have the option of excluding the operation of the Act, it should not affect prior settlors who had no such option. 3. As regards trusts or mortgages created by instruments since the date of the Act, it would seem that to the extent of sale monies and mortgage monies the whole doctrine in equity of seeing to the application of money has been swept away. It cannot be said that where A. is trustee

(d) Spalding v. Shalmer, 1 Vern. 301; Thomas v. Townsend, 16 Jur. 736.

(e) Pierce v. Scott, 1 Y. & C. 257.

for B. the money is payable to B. and not to A., and that therefore the clause shall not apply, for the doctrine of equity is that the money is *payable* to A., but the purchaser or mortgagee is bound to see it properly *applied* by A.

Lord Cranworth's Act.

By *Lord Cranworth's Act*, 23 & 24 Vict. c. 145, s. 29 (passed 28th August, 1860), it was enacted that "The receipts in writing of any trustees or trustee for *any money* payable to them or him by reason or in exercise of any *trusts* or *powers*" should be good discharges; but by section 34, the operation of the Act was expressly confined to instruments executed after the passing of the Act.

[44 & 45
Vict. c. 41.]

[By the Conveyancing and Law of Property Act, 1881, which repealed the 29th section of Lord Cranworth's Act, "the receipts in writing of any trustees or trustee for any money, securities, or other personal property or effects payable, transferable, or deliverable to them or him under any trust or power" are made sufficient discharges, and the section applies to trusts created either before or after the commencement of the Act (*f*).]

As the clauses in [the Acts prior to the Conveyancing and Law of Property Act, 1881, were not retrospective, and questions may still arise on titles as to the validity of receipts by trustees who had no express powers of signing receipts,] it is necessary to consider generally and apart from legislative enactment the power of trustees for sale to sign receipts.

Principle of requiring a purchaser to see to the application of his purchase-money.

1. As a general rule, if a person have in his hands money or other property to which another person is entitled, he cannot discharge himself from liability but by payment or transfer to the true owner. If an estate [* 453] be vested in A. upon trust to sell and *divide the proceeds between B. and C., in a Court of *law* the absolute ownership is in A., and his receipt, therefore, will discharge the purchaser; but in equity B. and C., the *cestuis que trust*, are the true proprietors, and A. is merely the instrument for the execution of the settlor's purpose, and the receipt, therefore, to be effectual, must be signed by B. and C. (*g*).

The rule controlled by the intention of the settlor.

2. Such is the *prima facie* rule in trusts; but in every instance it is liable to be controlled and defeated by an intention to the contrary collected from the in-

[(*f*) 44 & 45 Vict. c. 41, ss. 36, 71.]

(*g*) See *Weatherly v. St. Giorgio*, 2 Hare, 624. The power of the vendor to sign a discharge for the purchase-money is a question not of *conveyance* but of *title*; *Forbes v. Peacock*, 12 Sim. 521.

strument creating the trust, whether that intention be *expressed* or *implied*.

3. The former is the case, if the settlor direct in *express* terms that the receipts of A., the trustee, shall discharge the purchaser from seeing to the application of the purchase money; for B. and C. cannot at the same moment claim under and contradict the instrument—they cannot avail themselves of the sale, and reject the proviso affecting the receipt¹. Either expressed

The words in a *power of attorney*, “to sign discharges in the name of the assignor or otherwise, and to do all other acts as the principal might have done,” have been held to carry such a direction (*h*) where not controlled by a subsequent receipt clause tending to negative that intent (*i*).² But the receipt clause has not always been liberally construed; as where trustees were entitled to receive a sum of *stock* with a power of varying securities, a receipt signed for *cash* was held to be no discharge, though the Court said that had there been any indication of an intention to exercise the power of varying securities for which cash would be required, the decision might have been different. (*k*). It would * have been more satisfactory had the Court [* 454] held that as the trust fund in the hands of the trustees in the shape of cash did not necessarily imply a breach of trust the receipt was sufficient.

4. In what cases a power of signing receipts is *implied*, has never been satisfactorily ascertained. However, two principles appear to be the basis upon which Or implied.

(*h*) *Binks v. Lord Rokeby*, 2 Mad. 227; see 238, 239; *Desborough v. Harris*; 5 De G. M. & G. 439. In this case L. C. Cranworth considered that an assignment of a policy by way of mortgage vests a power of signing receipts in the mortgagee from the nature of the case, and independently of any express power of signing receipts, for the possession of the policy is evidence that something is due, and the Insurance Company cannot be expected to take the account between mortgagor and mortgagee. Of course it would be otherwise if the company had express notice that the mortgage had been satisfied. The difficulty felt by the insurance companies in such cases has been, that after paying upon the equitable title they might incur costs pending an action upon the legal title. However, a defendant may now plead an equitable defence at law; and if successful upon the equitable defence would recover his costs in the action. See further *Ottley v. Gray*, 16 L. J. N. S. Ch. 512; *Curton v. Jellicoe*, 14 Ir. Ch. Rep. 180. A late Act has enabled the assignee of a policy to bring an action in a court of law. 30 & 31 Vict. c. 144, s. 1. And see 36 & 37 Vict. c. 66.

(*i*) *Brasier v. Hudson*, 9 Sim. 1.

(*k*) *Pell v. De Winton*, 2 De G. & J. 13.

¹ *Duff v. Calvert*, 6 Gill. 487.

most of the distinctions taken by the Courts have been founded.

Direction to sell implies power in some one to sign discharges at time of sale.

5. *First*. In the creation of a trust for *immediate* sale, it is implied that a legal and equitable discharge for the purchase money shall be *signed by some one at the time of the sale*. There can be no conveyance of the estate without payment of the money, and there can be no such payment without a complete discharge. Should the settlor have contemplated a sale at a time when, as he must have known, the *cestuis que trust*, or some of them, were either not in existence, or not of capacity to execute legal acts, the intention must be presumed that the receipts of the trustees should be a release to the purchaser.

Balfour v. Welland.

Thus, were a deed was executed in India for payment of debts, with a proviso that creditors in India should be allowed six months to come in, and those in Europe eighteen months, and if any were under disability, they should be further allowed the like periods from the time the disability ceased, Sir W. Grant said, "The deed very clearly confers an *immediate* power of sale for a purpose that cannot be *immediately* defined. It is impossible to contend that the trustees might not have sold the whole property at any time they thought fit after the execution of the deed, and yet it could not be ascertained, until the end of eighteen months, who were the persons among whom the produce of the sale was to be distributed. If the sale might take place at a time when the distribution could not possibly be made, it must have been intended that the trustees should of themselves be able to give a discharge for the produce, for the money could not be paid to any other person than the trustees" (1).

Case of infancy.

So where A. devised certain lands to his children, some of whom were *infants*, "the same to be sold when the executors and trustees of his will should see proper, and the purchase-money to be equally and severally divided amongst his above-named children," Sir J. Leach said, "It is plain the testator intended that the trustees should have an immediate power of sale. Some of the children were infants, and not capable of signing re- [* 455] ceipts. I must therefore * infer, that the testator meant to give to the trustees the power to sign receipts, being an authority necessary for the execution of his declared purpose" (m).

(1) Balfour v. Welland, 16 Ves. 151, see 156.

(m) Sowarsby v. Lacy, 4 Mad. 142; Lavender v. Stanton, 6

As to *cestuis que trust* who, after the date of the instrument, go out of the jurisdiction, or are otherwise incapacitated to concur, the general rule does not apply, for it cannot be said that the settlor meant the trustees to sign receipts for them, the presumption being the other way.

As to *cestuis que trust* out of the jurisdiction.

6. *Secondly.* If a sale be directed, and the proceeds are not simply to be paid over to certain parties, but there is a *special* trust annexed, the inference is, that the settlor meant to confide the execution of the trust to the hands of the trustee, and not of the purchaser, and that the trustee therefore can sign a receipt (*n*).¹

Where trust is annexed to the purchase-money it is implied that the trustee shall apply it.

An opinion of Mr. Booth shows that even in his time regard was had to the nature of the trust in exempting the purchaser from liability. A testator had directed his trustees to sell and invest the proceeds upon the trusts thereinafter mentioned, and then gave his wife an annuity of 50*l.* a year, for her life, to be paid out of the proceeds, and subject thereto, gave the fund to his son; but in case of his death under twenty-one, to the person entitled to his Taunton lands. Mr. Booth wrote, "I am of opinion, that all that will be incumbent on the purchaser to see done will be to see that the trustees invest the purchase-money, in their names, in some of the public stocks or funds, or on Government securities, and in such case the purchaser will not be answerable for any misapplication, after such investment of the money, of any monies which may arise by the dividends or interest, or by any disposition of such funds, stocks, or securities, *it not being possible that the testator should expect from any purchaser any further*

Mr. Booth's opinion.

Mad. 46; and see *Breedon v. Breedon*, 1 R. & M. 413; *Cuthbert v. Baker*, Sugd. Vend. & Purch. 842, 843, 11th. ed.

(*n*) *Doran v. Wiltshire*, 3 Sw. 699; *Balfour v. Welland*, 16 Ves. 157; *Wood v. Harman*, 5 Mad. 368; *Locke v. Lomas*, 5 De G. & Sm. 326. See *Glynn v. Locke*, 3 Dr. & War. 11; *Ford v. Ryan*, 4 Ir. Ch. Rep. 342. In *Cox v. Cox*, 1 K. & J. 251, Vice-Chancellor Wood held, that a power of signing receipts was by no means one inserted as of course in legal instruments, but often excluded, and when excluded, was never implied, except under very special circumstances. The question in that case arose upon the construction of a will which gave to the tenant for life the like powers of selling and exchanging as were contained in a settlement referred to, and in which were, not only powers of sale and exchange, but also a power of signing receipts, and the Vice-Chancellor was of opinion that the powers of sale and exchange only, without the power of signing receipts, were incorporated by reference.

¹ *Garnett v. Macon*, 6 Call, 308; *Williamson v. Morton*, 2 Md. Ch. 91; *Steele v. Levisay*, 11 Gratt. 454; *Clyde v. Simpson*, 4 Ohio St. 445.

*degree of care or circumspection than during the time [* 456] that the transaction * for the purchase was carrying on, and therefore the testator must be supposed to place his sole confidence in the trustees, and this is the settled practice in these cases, and I have often advised so much, and no more, to be done."* And in this opinion Mr. Wilbraham also concurred (o).

Trust to pay
debts.

7. To the principle under consideration is referable the well-known rule, that a purchaser is not bound to see to the application of his money where the trust is for payment of *debts generally*; for to ascertain who are the creditors, and what is the amount of their respective claims, is matter of trust involving long and intricate accounts, and requiring the production of vouchers, which the purchaser would have no right to require (p).¹ And mere absence of statement of the purpose for which the money is wanted will not make a purchaser or mortgagee liable on the ground of presumed knowledge that the money was to be applied otherwise than for payment of debts (q). So if the trust be for payment of a *particular* debt named, and of the testator's *other* debts (r). So if the trust be for payment of debts and *legacies*, the purchaser is equally protected; for as the discharge of the debts must precede that of the legacies, and the purchaser is not called upon to mix himself up with the settlement of the

(o) 2 Cas. and Op. 114.

(p) *Forbes v. Peacock*, 11 Sim. 152; and see S. C. 12 Sim. 528; 1 Ph. 717; *Stroughill v. Anstey*, 1 De G. M. & G. 635; *Corser v. Cartwright*, 7 L. R. H. L. 731; *Dowling v. Hudson*, 17 Beav. 248; *Culpepper v. Aston*, 2 Ch. Ca. 223; *Watkins v. Cheek*, 2 S. & S. 205, *per* Sir J. Leach; *Anon.* Mos. 96; *Hardwick v. Mynd*, 1 Anst. 109; *Johnson v. Kennett*, 3 M. & K. 630, *per* Lord Lyndhurst; *Rogers v. Skillicorne*, Amb. 189, *per* Lord Hardwicke; *Walker v. Smalwood*, Id. 677, *per* Lord Camden; *Barker v. Duke of Devonshire*, 3 Mer. 310; *Abbot v. Gibbs*, 1 Eq. Ca. Ab. 358; *Binks v. Rokeby*, 2 Mad. 238, *per* Sir T. Plumer; *Dunch v. Kent*, 1 Vern. 260, admitted; *Elliot v. Merryman*, Barn. 78; *Smith v. Guyon*, 1 B. C. C. 186, and cases cited *Ib.* note; *Ithell v. Beane*, 1 Ves. 215; *per* Lord Hardwicke; *Lloyd v. Baldwin*, *Ib.* 173, *per eundem*; *Dolton v. Hewen*, 6 Mad. 9; *Ex parte Turner*, 9 Mod. 418, *per* Lord Hardwicke; *Gosling v. Carter*, 1 Coll. 644; *Eland v. Eland*, 1 Beav. 235; S. C. 4 M. & Cr. 420; *Jones v. Price*, 11 Sim. 557; *Currer v. Walkley*, 2 Dick. 649, corrected from Reg. Lib. 3 Sugd. Vend. & Purch. 16c, 10th ed.

(q) *Corser v. Cartwright*, 7 L. R. H. L. 731.

(r) *Robinson v. Lowater*, 17 Beav. 592; 5 De G. M. & G. 272.

¹ *Goodrich v. Proctor*, 1 Gray, 570; *Garnett v. Macon*, 6 Call, 308; *Bruch v. Lantz*, 2 Rawle, 392; *Conover v. Stathoff*, 38 N. J. 55.

debts, he is necessarily absolved from all liabilities in respect of the legacies (s).¹

8. But if the trust be for payment of *particular* or *scheduled * debts only* (t),² or of *legacies* [* 457] only (u),³ then, as there is no trust to be executed requiring time or discretion, but the purchase-money is simply to be distributed amongst certain parties, there is no reason why the purchaser should not, under the general rule, be expected to see that the purchase-money finds its way into the proper channel. And the purchaser, where legacies only are charged, is still bound to see to the application of his money, though by 3 & 4 W. 4, c. 104, the real estate of all persons deceased since the 29th of August, 1833, is liable, in the hands of the heir or devisee, to the payment of debts generally, whether by specialty or simple contract (v).

Scheduled debts or legacies.

Late Assets Act.

9. And even where the estate is subjected by the testator to a trust for payment of debts generally, the purchaser will not be indemnified by the receipt of the trustee if there be any collusion between them (w);⁴

Where, notwithstanding a charge of debts, the purchaser must see to the application of his money.

(s) *Rogers v. Skillicorne*, Amb. 188; *Smith v. Guyon*, 1 B. C. C. 186; *Jebb v. Abbott*, and *Beynon v. Gollins*, cited Co. Lit. 290 b, note by Butler; *Williamson v. Curtis*, 3 B. C. C. 96; *Johnson v. Kennett*, 3 M. & K. 630; *per Lord Lyndhurst*; 6 Ves. 654, note (a); *Watkins v. Cheek*, 2 S. & S. 205, *per Sir J. Leach*; *Eland v. Eland*, 1 Beav. 235; S. C. 4 M. & Cr. 420; *Page v. Adams*, 4 Beav. 269; *Forbes v. Peacock*, 12 Sim. 528; 1 Ph. 717.

(t) *Doran v. Wiltshire*, 3 Sw. 701, *per Lord Thurlow*; *Smith v. Guyon*, 1 B. C. C. 186, *per eundem*, and cases cited Ib. note; *Rogers v. Skillicorne*, Amb. 189, *per Lord Hardwicke*; *Humble v. Bill*, 1 Eq. Ca. Ab. 359, *per Sir N. Wright*; *Anon. Mos.* 96; *Spalding v. Shalmer*, 1 Vern. 303, *per Lord North*; *Abbot v. Gibbs*, 1 Eq. Ca. Ab. 358; *Elliot v. Merryman*, Barn. 81, *per Sir J. Jekyll*; *Binks v. Rokeby*, 2 Mad. 238, *per Sir T. Plumer*; *Ithell v. Beane*, 1 Ves. 215, *per Lord Hardwicke*; *Lloyd v. Baldwin*, 1 Ves. 173, *per eundem*; and see *Dunch v. Kent*, 1 Vern. 260; *Culpepper v. Aston*, 2 Ch. Ca. 223.

(u) *Johnson v. Kennett*, 3 M. & K. 930; *Horn v. Horn*, 2 S. & S. 448.

(v) *Horn v. Horn*, 2 S. & S. 448.

(w) *Rogers v. Skillicorne*, Amb. 189, *per Lord Hardwicke*; *Eland v. Eland*, 4 M. & Cr. 427, *per Lord Cottenham*.

¹ *Grant v. Hook*, 13 S. & R. 259; *Cadbury v. Duval*, 10 Barr. 265, *Dewey's Exrs. v. Ruggles*, 25 N. J. Eq. 35, *Andrews v. Sparhawk*, 13 Pick. 393.

² *Long v. Long*, 1 Watts, 267; *Hoover v. Hoover*, 5 Barr. 351; *Duffy v. Calvert*, 6 Gill. 487; *Bugber v. Sargent*, 23 Me. 269; *Lupton v. Lupton*, 2 Johns. Ch. 614; *Swasey v. Little*, 7 Pick. 296.

³ In the United States where lands are devised in trust to secure for the payment of particular debts or legacies, the purchaser is under no liability to see the application of the purchase money, *Grant v. Hook*, 13 S. & R. 259, *Hannum v. Speare*, 1 Yeates, 553; *Cryder's App.* 1 Jones 72, *Wilson v. Davison*, 2 Rob. (Va.) 385.

⁴ *Dewey's Exrs. v. Ruggles*, 25 N. J. Eq. 35; *Potter v. Gardner*, 12 Wheat 498.

or if the purchaser have notice from the intrinsic evidence of the transaction that the purchase-money is intended to be misapplied (*x*);¹ or if a suit has been instituted which takes the administration of the estate out of the hands of the trustees (*y*); and these doctrines, it is conceived, are not affected by the clauses in Lord St. Leonards' and Lord Cranworth's Acts, [and the late Conveyancing Act] which apply only to *bona fide* payments.

Purchase
from trustees
after a length
of time.

10. And if the purchaser is dealing with trustees at a great distance of time, and when the trust ought long since to have been executed, the purchaser is bound to enquire and satisfy himself to a fair and reasonable extent, that the trustees are acting in the discharge of their duty (*z*). But where *twenty-seven* years had elapsed, and the beneficiaries subject to the charge had been let into possession, and the purchaser asked if [* 458] there were any debts * and the vendors declined to answer, it was held that the vendors could make a good title (*a*), and Lord Romilly observed that he had known so many cases where after distribution of the assets, debts had appeared which did not exist at the death of the testator, but which arose subsequently out of obligations entered into by him, that a very liberal term ought to be allowed for the exercise of the power of sale (*b*). [The Court of Appeal has, however, recently expressed an opinion that twenty-seven years is too long a period, and laid down the rule that for a period of twenty years from the testator's death a purchaser should not be bound or entitled to ascertain whether the debts were paid, but that after the elapse of that period it is fair to presume that the debts have been paid and the purchaser is bound to enquire (*c*), and this rule has been followed in Ireland (*d*).]

(*x*) *Watkins v. Cheek*, 2 S. & S. 199, *Eland v. Eland*, 4 M. & Cr. 427, *per* Lord Cottenham; *Burt v. Trueman*, 6 Jur. N. S. 721; and see *Stroughill v. Anstey*, 1 De G. M. & G. 648; *Colyer v. Finch*, 5 H. L. Ca. 923.

(*y*) *Lloyd v. Baldwin*, 1 Ves. 173.

(*z*) *Stroughill v. Anstey*, 1 De G. M. & G. 654, *per* Lord St. Leonards; and see *Forbes v. Peacock*, 11 Sim. 502; 12 Sim. 528; 11 M. & W. 637; 1 Ph. 717; *Devaynes v. Robinson*, 24 Beav. 93; *Sabin v. Heape*, 27 Beav. 553; *McNeillie v. Acton*, 2 Eq. Rep. 21.

(*a*) *Sabin v. Heape*, 27 Beav. 553.

(*b*) *Ib.* 560.

(*c*) *Re Tanqueray-Willaume and Landau*, 20 Ch. D. 465.]

(*d*) *Re Molyneux and White*, 13 L. R. Ir. 382.]

¹ *Shaw v. Spencer*, 100 Mass. 388; *Clyde v. Simpson*, 4 Ohio, St. 445.

11. As the exemption of the purchaser from seeing Power of to the application of the purchase-money depends as a signing re- general rule upon the settlor's *intention*, the question cepts a ques- must be viewed with reference to the date of the instru- tion of inten- tion at the ment, and not as affected by circumstances which have date of the subsequently transpired (*e*).¹ Thus, if a trust be cre- instrument. ated for payment of debts and legacies, and the trustees, after full payment of the debts contract for the sale of the estate, the purchaser will not, upon this principle, be bound to see to the application of the money in payment of the legacies (*f*).

12. In *Forbes v. Peacock* (*g*), a testator directed his debts to be paid, and gave the estate to his wife (whom he appointed his executrix) for life, subject to his debts and certain legacies, and empowered her to sell the estate in her lifetime, and directed that if it were not sold in her lifetime, it should be sold at her death and the proceeds applied in a manner showing that they were intended to pass through the hands of the executors, and the testator requested certain persons to act as executors and trustees with his wife. The widow lived twenty-five years, and after her death the surviving executor contracted for the sale of the estate. The Vice-Chancellor of England held that, after so long a lapse of time from the testator's death, the purchaser had a right to ask if *the debts had been paid, and [*459] if he received no answer, it amounted to notice that they had been paid, and he must see to the application of his purchase-money. The V.C. observed, "When the objection is made by the purchaser that the executors cannot make a good title because all the debts have been paid, *if the question is put by him simply, are there or are there not any debts remaining unpaid, he has a right to an answer*" (*h*). And on a subsequent day he

(*e*) See *Balfour v. Welland*, 16 Ves. 156; *Johnson v. Kennett*, 3 M. & K. 631; *Eland v. Eland*, 4 M. & Cr. 428.

(*f*) *Johnson v. Kennett*, 3 M. & K. 624, reversing S. C. 6 Sim. 384; *Eland v. Eland*, 4 M. & Cr. 420; *Page v. Adam*, 4 Beav. 269; *Stroughill v. Anstey*, 1 De G. M. & G. 635.

(*g*) 11 Sim. 152; 12 Sim. 528; 11 M. & W. 637; 1 Ph. 717; see *Stroughill v. Anstey*, 1 De G. M. & G. 650.

(*h*) 12 Sim. 537; see *Sabin v. Heape*, 27 Beav. 553. In the case of *A. Solomon*, vendor and *F. Davey*, purchaser, under the 9th section of 37 & 38 Vict. c. 78, V.C. Hall decided that the vendor was bound to answer the purchaser's enquiry "whether the vendor is or her solicitors are aware of any judgments, settlements, mortgages, charges, or incumbrances of any description affecting the property not disclosed by the abstract of the vendor's title." But the V.C. added that he "must not be consid-

¹ *Garnett v. Macon*, 6 Call. 308.

observed, "Here the purchaser has asked the executor whether any of the testator's debts were unpaid at the date of the contract, *and the executor refused to give him an answer*. Under these circumstances, if it should turn out that all the debts were paid, I should hold that the purchaser had notice of that fact, and that he was bound to see that his purchase-money was properly applied" (i).

It is evident that this doctrine was not in accordance with former decisions, and the cause was carried upon appeal to the Lord Chancellor, when the decision below was reversed (k). Lord Lyndhurst said, "If the purchaser had notice that the vendor intended to commit a breach of trust, and was selling the estate for that purpose, he would, by purchasing under such circumstances, be concurring in the breach of trust, and thereby become responsible. But assuming that the facts relied upon in this case amount to notice that the debts had been paid; yet, as the executor had authority to sell not only for the payment of debts, but also for the purpose of distribution among the residuary legatees, this would not afford any inference that the executor was committing a breach of trust in selling the estate, or that he was not performing what his duty required. The case then comes to this: If authority is given to sell for the payment of debts and legacies, and the purchaser *knows that the debts are paid*, is he bound to see to the application of the purchase-money? I apprehend not."

[* 460] *Lord St. Leonards, with reference to the same important case, observed, "When a testator by his will charges his debts and legacies, he shows that he means to entrust his trustees with the power of receiving the money, anticipating that there will be debts, and thus providing for the payment of them. It is, by implication, a declaration by the testator that he intends to entrust the trustee with the receipt and application of the

ered as altogether approving of the requisition being made in the form above-mentioned. The answer might lead to the disclosure of what the purchaser would rather not know. The requisition should, he thought, be added to, thus, 'and which if remaining undisclosed might prejudicially affect the purchaser,' " March, 1875. [But this view has since been overruled by the Court of Appeal in the case of *Re Ford and Hill*, 10 Ch. D. 365, where it was held that the purchaser was not entitled to make any such requisition at all.]

(i) 12 Sim. 542.

(k) 1 Ph. 717; see *Stroughill v. Anstey*, 1 De G. M. & G. 653; *Mather v. Norton*, 16 Jur. 309; [*Re Tanqueray-Willaume and Landau*, 20 Ch. D. 465.]

money, and not to throw any obligation at all upon the purchaser or mortgagee. *That intention does not cease because there are no debts.* If a trust be created for payment of debts and legacies, the purchaser or mortgagee should in no case (in the absence of fraud), be bound to see to the application of the money raised." And his Lordship added, "as to *Forbes v. Peacock* it is quite a mistake to suppose that that was a trust executed at a distance of twenty-five years from the time when it arose, for it was executed at the time when it did arise, which happened to be twenty-five years after the death of the testator" (l).

13. If a trustee have authority to invest the trust fund with a power of *varying securities*, but without an express power of signing receipts, it is implied from the nature of the trust that he shall sign receipts (m), and if he be authorized to *invest on security* simply without power of varying securities he can sign receipts, for he cannot prevent the borrower from paying off the money, and who but the trustee can receive it back (n). Indeed a power of *investment* has been held to carry with it a power of *varying the securities* (o). Where, however, the trustee was directed to invest upon *security*, but *real security* was not mentioned, and he lent upon a *mortgage*, the Court did not think it so clear that the trustee could sign a receipt when the money was paid off as to compel a purchaser to take a title which depended on that question (p). The power of signing a receipt in such cases turns on the intention as collected from the instrument, and unless it contain authority to lend on a *mortgage* no power of signing a receipt when the mortgage money is paid off is implied.

14. A power of signing receipts was held not to be implied in a power of sale and exchange (q). But in that case it was a mere power of sale and exchange and not the ordinary power inserted in settlements, accompanied with directions for laying out on another purchase with interim investment on securities.

* 15. The case in which a testator, instead [* 461] of devising the estate upon an *express trust* for payment of debts, creates a *charge* of debts upon his real estate, seems to require particular examination. It

Power of
varying
securities,
and of invest-
ment.

Power of
sale and ex-
change.

Charge of
debts.

(l) *Stroughill v. Anstey*, 1 De G. M. & G. 653, 654.

(m) *Locke v. Lomas*, 5 De G. & Sm. 326.

(n) *Wood v. Harman*, 5 Mad. 368.

(o) *Re Cooper's Trust*, W. N. 1873, p. 87.

(p) *Hanson v. Beverley*, Sugd. Vend. & P. 848, 11th edit.

(q) *Cox v. Cox*, 1 K. & J. 251.

might have been a simple and useful rule to hold under such circumstances that the executor, and the executor only, as the person who has administration of the *personal* assets, should, by virtue of an implied power, sell the real estate for payment of the debts; but no such rule ever existed, and we proceed, therefore, to ascertain, as far as we can, by what principle the Court is guided.

Devise to trustees with a charge of debts.

a. If a testator *charge* his real estate with debts, and then *devises it to trustees* upon certain trusts, which do not provide for a sale or perhaps even negative the intention of conferring a power of sale, can the *trustees* give a good title to a purchaser? It is clear that [subject to the restrictions arising under the Settled Land Act, which will be subsequently discussed (*r*),] the trustees and the executor together can sell (*s*), and the question is, upon what principle this proceeds. Is the *executor* the vendor, and if so, has he a *legal* power which enables him to pass the estate at law independently of the trustee? V.C. (late L. J.) Knight Bruce seemed, on one occasion, to think that the cases of *Shaw v. Borrer* and *Ball v. Harris* might have been decided on this footing (*t*), and some recent cases lean in the same direction (*u*). But the notion of the executor passing the legal estate in such a case was never suggested until the last few years, and what was said by the Court of Exchequer in *Doe v. Hughes* was at least true at the time it was spoken, viz., that not a single case could be produced in which a mere charge had been held to give the executors a legal power (*v*).

[*(r)* *Post* p. 470.]

[*(s)* *Shaw v. Borrer*, 1 Keen, 559; *Ball v. Harris*, 8 Sim. 485; S. C. 4 M. & Cr. 264; *Page v. Adams*, 4 Beav. 269; and see *Forbes v. Peacock*, 11 Sim. 152; 12 Sim. 528; 11 M. & W. 630; 1 Ph. 717; *Sabin v. Heape*, 27 Beav. 553; *Corser v. Cartwright*, 7 L. R. H. L. 731. In *Shaw v. Borrer*, the trustees and executors were co-plaintiffs, and the prayer of the bill was, that the purchase-money might be paid to the executors. This, if done by the order of the Court, would indemnify the trustees; but it did not follow that the trustees, on the completion of the sale *out of Court*, could have allowed the executors to receive the money. The question to whom the money should be paid was not adverted to in the argument, nor does it appear to whom it was paid.

[*(t)* *Gosling v. Carter*, 1 Coll. 649.

[*(u)* See *Robinson v. Lowater*, 17 Beav. 592; 5 De G. M. & G. 272; *Eidsforth v. Armstead*, 2 K. & J. 333; *Wrigley v. Sykes*, 21 Beav. 337; *Storry v. Walsh*, 18 Beav. 568; *Colyer v. Finch*, 5 H. L. Ca. 905; *Hodkinson v. Queen*, 1 J. & H. 310; *Greetham v. Colton*, 34 Beav. 615.

[*(v)* *Doe v. Hughes*, 6 Exch. 231. [See *Re Tanqueray-Willaume and Landau*, 20 Ch. D. 476, where it was regarded as settled law, that a charge alone would not enable the executors to pass the legal estate.]

Have the executors *then an *equitable* power, [* 462] and is the trustee who has the legal estate bound to convey it as the executor directs? This doctrine would be a very rational one, but there is no trace of it in the cases themselves. Apparently they were decided on the familiar principal that in a Court of Equity there is no difference between a charge of debts and a trust for payment of debts (*w*), and that the trustees therefore took the legal estate upon the trusts of the will, the first of which was to pay the testator's debts. It is certainly not a little remarkable that after an examination of all the authorities upon the subject, there does not appear to be one in which the trustee has sold alone, without the concurrence of the executor. This circumstance may be easily accounted for, as trustees of the will are almost invariably appointed executors also, and where that is not the case, the purchaser naturally requires the concurrence of the executor, not on the ground that he is the vendor, but to satisfy the purchaser that the sale of the real estate is *bonâ fide* from the insufficiency of the personal assets. In some of the cases the Court has noticed, but not laid any stress upon, the circumstance of the personal representative concurring (*x*), or of the characters of trustee and personal representative being combined; but in others that fact has been passed over in silence as a mere accident, and the Court has relied on the general doctrine that a trustee of the estate charged with debts could sell and sign a valid discharge for the purchase-money (*y*). In *Doe v. Hughes* (*z*), the case most adverse to the powers arising from a charge of debts, it was admitted that by a devise to *trustees* of the real estate, subject to a charge of debts, the trustees had thereby imposed upon them the duty of raising the

(*w*) *Elliott v. Merryman*, Barn. 81; *Ex parte Turner*, 9 Mod. 418; *Jenkins v. Hiles*, 6 Ves. 654, note (*a*); *Bailey v. Elkins*, 7 Ves. 323; *Ball v. Harris*, 4 M. & Cr. 267; *Wood v. White*, 4 M. & Cr. 482; *Commissioners of Donations v. Wybrants*, 2 Jon. & Lat. 197.

(*x*) See *Shaw v. Borrer*, 1 Keen, 559; *Forbes v. Peacock*, 12 Sim. 537; and see V. C. Knight Bruce's remarks upon *Shaw v. Borrer*, and *Ball v. Harris*, in *Gosling v. Carter*, 1 Coll. 649. But in *Ball v. Harris*, the V. C. of England observed, "It is manifest that Harris (the trustee), who had the legal fee was competent to mortgage that estate to any person who would advance money for the benefit of the testator's estate," 8 Sim. 497; and it is equally clear that Lord Cottenham was of opinion that Harris was a trustee for payment of debts, 4 M. & Cr. 267.

(*y*) See *Ball v. Harris*, at the passages referred to in the preceding note; *Forbes v. Peacock*, 12 Sim. 546.

(*z*) 6 Exch. 231.

money to pay the debts, and this was the opinion of Lord Hardwicke, as expressed in a case which we do not remember to have seen cited. In *Ex parte Turner* (a), where the estate had been given subject to [* 463] debts, but no express trust was created for *the purpose, he observed, "Where a devise is general 'in trust' or 'subject to pay debts,' the devisee may sell or mortgage, but *he* must pay the money to the creditors of his devisor; but if he do not, the mortgagee is not to suffer, for in cases of these general devises he is not obliged to see to the application of the money he advances. But even in this case inconveniences often arise, for where the estate is equitable assets, as it is where it is accompanied with a trust, the creditors who have not specific liens upon the land ought to come in equally; and *pari passu*. However, if the trustee prefer one creditor to another, where he ought not, the remedy usually is against the trustee, and not the lender of the money, for if the latter was to see to the application of his money upon so general a trust, he could not safely advance his money without a decree in this Court." ¹

If the trustees of an estate charged with debts can, by virtue not of the express trust but of the trust implied by the charge, sell the estate, and sign a receipt for the purchase-money, it would seem to follow that they cannot allow the proceeds to be paid to the *executor* as not being the proper hand to receive (b), the executor in that character having no privity with the real estate. The necessity of requiring the concurrence of the personal representative would often lead to practical inconvenience, for on the death of the executor intestate there would be no personal representative of the testator, and the personal assets having been exhausted, there would be no fund for taking out letters of administration; not to mention that, should the executor be held to have any concern with the proceeds of the real estate, by virtue of the *will*, the administrator, not being appointed by the will, would not succeed to the power of the executor, which should be borne in mind as of some importance in considering whether the

(a) 9 Mod. 418; and see *Colyer v. Finch*, 5 H. L. Cas. 922.

(b) See *Gosling v. Carter*, 1 Coll. 650, where V. C. Knight Bruce says, "If payment ought to be made to one, it is not, necessarily, a good payment to make that payment to one and another."

¹ *Andrews v. Sparhawk*, 13 Pick. 401.

sale is substantially that of the executor or of the trustee who takes subject to the charge.

Should the neat point ever call for a decision, it will probably be held that the trustee, without the concurrence of the executor, can give a good title (c).

By Lord St. Leonards' Act (22 & 23 Vict. c. 35, s. 14) where by a will coming into operation after 13th [* 464] August, 1859, a testator * charges real estate with the payment of *debts*, or any *specific legacy or sum*, and devises the estate so charged to *trustees* for the whole of his estate or interest, and makes no express provision for raising the debts, legacy, or sum, the *devisees in trust* may sell or mortgage; and by s. 15, the power is continued to all persons taking the estate so charged by survivorship, descent, or devise; and by s. 17, purchasers and mortgagees are not bound to enquire whether such powers "have been duly and correctly exercised by the person or persons acting in virtue thereof." Where *debts* are charged, of course a purchaser or mortgagee under these powers is not bound to see to the application of his money, and where a *specific legacy or sum* is charged, if the above enactments do not *per se* confer a power of signing receipts, the purchaser or mortgagee is exempted from seeing to the application by the 23rd section of the same Act (d).

Lord St.
Leonards'
Act.

The 18th section declares that the Act shall "not extend to a devise to any person or persons in fee or in tail, or for the testator's whole estate and interest, charged with debts or legacies, nor shall it affect the power of any such devisee or devisees to sell or mortgage as he or they may by law now do." To make this section consistent with the 14th, the "devise" referred to in the 18th section must mean a *beneficial devise*, and "devisee or devisees" a *beneficial devisee or devisees*, and the inference would seem to be that, in the view of the framer of the Act, no legislative assistance was needed in the case of a beneficial devise subject to a charge. Indeed the concluding words of the section seem almost tantamount to a declaration of the legislature that beneficial devisees subject to a charge have power to sell or mortgage, which is the case we next proceed to consider.

β. If a testator charge his debts and devise the estate

(c) The recent case of *Hodkinson v. Quinn*, 1 J. & H. 303, when closely considered, will be found to afford little aid towards solving this question; and see *Cook v. Dawson*, 29 Beav. 126; 3 De G. F. & J. 127.

[(d) See also 44 & 45 Vict. c. 41, s. 36.]

Devise to a person beneficially with a charge of debts.

subject to the charge to *A. and his heirs* not upon trust but *for his own use*, can the beneficiary in this case make a good title? The answer to the question last discussed is an answer also to this, for if where the express trust negatives the intention of conferring a power to sell the trustee can still make a good title, it is evident that he can only do so by virtue of the charge. Any distinction between the two cases would be in favour of the beneficial devisee, for if the trustee in defiance of the express trust can sell, *à fortiori* the devisee can, who is fettered by no such restriction. In both instances the charge operates as a trust for payment of debts, and is attended with all the same consequences. [* 465] "A charge," said Lord *Eldon, "is in substance and effect *pro tanto* a devise of the estate upon trust to pay the debts" (*e*), and "this," observed Lord St. Leonards, on citing the dictum, "is supported by the current of authorities" (*f*). It is clear that the devisee can, where he also fills the character of executor, make a good title (*g*), and in some of the cases the Court did not in terms rely on the characters being combined (*h*), but it is singular that no authority can be found in which the question whether the devisee alone can make a good title has arisen.

In the Court of Exchequer (*i*) it was said that in a devise to *trustees*, subject to a charge of debts, the trustees could sell; but that a charge in the hands of a *devisee* if the lands were devised, or in the hands of the *heir-at-law* if the lands descended, was a charge only in equity. The Court was there considering, more particularly, the question of *legal* powers; but if it was intended to be said that a devisee, subject to a charge, could not sell and sign a receipt for the money, the doctrine is inconsistent with the nature of a charge of debts in equity as commonly understood. The prevalent opinion hitherto is believed to have been that a devisee subject to debts can sign a receipt for the purchase-money (*k*), and the cases in which the Court has

(*e*) *Bailey v. Ekins*, 7 Ves. 323.

(*f*) *Commissioners of Donations v. Wybrants*, 2 Jon. & Lat. 198.

(*g*) *Elton v. Harrison*, 2 Sw. 276, note; *Elliot v. Merryman*, Barn. 78; *Dolton v. Young*, 6 Madd. 9; *Johnson v. Kennett*, 6 Sim. 384; 3 M. & K. 624; *Eland v. Eland*, 1 Beav. 235, 4 M. & Cr. 420; *Page v. Adam*, 4 Beav. 269; *Corser v. Cartwright*, 8 L. R. Ch. App. 971; affirmed by H. L., 7 L. R. H. L. 731.

(*h*) *Elliot v. Merryman*, *Dolton v. Young*, *Johnson v. Kennett*, *Eland v. Eland*, *ubi supra*; *Colyer v. Finch*, 5 H. L. Ca. 905, 922.

(*i*) *Doe v. Hughes*, 6 Exch. 231.

(*k*) See the cases cited in note (*a*), p. 462, *supra*.

upheld purchases from a devisee with the concurrence of the executor but without relying upon such concurrence, would be a trap for purchasers should the Court now refuse to uphold a purchase from a devisee only. Considering the declaratory words contained at the end of the 18th section of Lord St. Leonards' Act, it may now, it is conceived, be safely assumed that a purchaser from a devisee subject to a charge of debts, will without the concurrence of the executor acquire a good title.

γ. If a testator charge his debts on the real estate, and does not devise the estate at all, but allows it to descend to the heir, can the heir sell and sign a receipt for the purchase-money? It appears to be clear that he cannot, for he takes nothing under the will, and cannot therefore be regarded as a person constituted by the testator a trustee by implication for [* 466] payment of debts (l); he can pass the legal estate, but he could not sign the receipt; i. e., if the heir misapplied the money the creditors might still come upon the estate.

Charge of debts where there is no devise of the estate.

But in this case, if the heir is disabled from selling can the executor sell (i. e., independently of Lord St. Leonards' Act, to be mentioned presently), for otherwise the charge of debts amounts to a direction for a Chancery suit? (m). The legal question arose in *Doe v. Hughes* (n) before the Court of Exchequer, and the Court held that a charge had no operation at law but must be enforced in equity. This decision has been found much fault with. The Master of the Rolls said that before the case in the Exchequer he had considered the law to be that a charge of debts gave the executors an implied power of sale (o); for otherwise, it is argued, in the case of a charge where the estate descends, there can be no sale without the aid of the Court. But this does not appear to follow. If a testator expressly direct that his estate shall be sold (without naming the person), and the fund is to be

(l) See *Gosling v. Carter*, 1 Coll. 650 (where the V.C. said that the intention to be collected was, that the heir-at-law should have nothing to do with it); *Robson v. Flight*, 34 Beav. 110, 5 N. R. 344; S. C. on appeal, 4 De G. J. & S. 608; *Doe v. Hughes*, 6 Exch. 231; *Forbes v. Peacock*, 11 M. & W. 637, 638.

(m) See *Robinson v. Lowater*, 5 De G. M. & G. 275.

(n) 6 Exch. 223.

(o) *Robinson v. Lowater*, 17 Beav. 601; and see *Wrigley v. Sykes*, 21 Beav. 337; *Storry v. Walsh*, 18 Beav. 568; *Sabin v. Heape*, 27 Beav. 553; *Hodkinson v. Quinn*, 1 J. & H. 309; *Cook v. Dawson*, 29 Beav. 123; 3 De G. F. & J. 127; *Greetham v. Colton*, 34 Beav. 615; *Hamilton v. Buckmaster*, 12 Jur. N. S. 986.

distributed in a way in which the executors alone can distribute it, a power of sale is given to the executors by implication over the legal estate even in Courts of law (*p*). By analogy to this, where there is no direction to sell, but only a charge of debts, this last, though an *umbra* in a Court of law, creates an *equitable* power of sale or mortgage in the view of a Court of Equity—*i. e.*, the executor may contract for the sale, and on the acceptance of the title by the purchaser, the person in whom the legal estate is vested will, as being a trustee for the executor, be compellable to convey as the executor directs, and if he refuses, the legal estate may be vested in the purchaser by the aid of the Trustee Acts (*q*). In *Gosling v. Carter* (*r*), Vice-Chancellor Knight Bruce declined to give an opinion whether a mere charge of debts gave to the executors a power of sale either at law or in equity, but would not compel a [* 467] purchaser to take the title from the * executor without the concurrence of the heir-at-law. In *Robinson v. Lowater* (*s*) the legal estate was already in the purchaser, so that the legal question did not arise, but it was held that the executors had given the purchaser a good title. In *Eidsforth v. Armstead* (*t*), Vice-Chancellor Wood professed to follow *Robinson v. Lowater*, and held the power of sale to be, according to the report, in the *trustees*, but which appears to be a mistake for the *executors*. The surviving trustee had devised the trust estate, and the devisee therefore could not sell, but the surviving trustee was also surviving *executor*, and appointed the devisee his *executor*, and in the character of *executor* the devisee might be thought to represent the original testator, though it seems the better opinion that even then the power of

(*p*) *Forbes v. Peacock*, 11 M. & W. 630; *Tylden v. Hyde*, 2 S. & S. 238; *Bentham v. Wiltshire*, 4 Madd. 44.

(*q*) See *Re Wise*, 5 De G. & Sm. 415; *Hodkinson v. Quinn*, 1 J. & H. 303.

(*r*) 1 Coll. 650, 652.

(*s*) 17 Beav. 592; 5 De G. M. & G. 272; and see *Storry v. Walsh*, 18 Beav. 568.

(*t*) 2 K. & J. 333. It does not appear how the purchaser had got or was to get the legal estate, whether from the executor, as having a legal power, or from the trustee, on the construction that the legal fee simple vested in the trustee under the will, or from the trustee, as having the legal estate during the life of H. Toulmin, with the concurrence of H. Toulmin, as having the legal estate in remainder, so as to extinguish his power of appointing by will. The case loses much of its force from the amicable manner in which the point was submitted to the Court.

sale would not pass to him (*u*). In *Wrigley v. Sykes* (*v*), the Master of the Rolls decided that the executors could contract for the sale of the estate, but guarded himself by saying that the Court, as far as it could, would certainly secure to the purchaser a good legal estate when the conveyance was made. It is conceived that *Doe v. Hughes* was a perfectly sound decision upon the legal question, but that the executors have an *equitable power of sale*, and consequently that the holder of the legal estate is a trustee for them (*w*). [This power of sale is implied because the executors are appointed by the testator to pay his debts, but such a power has never been implied in an administrator who is not appointed by the testator, but is the officer of the Probate Court (*x*).]

By Lord St. Leonards' Act, 22 & 23 Vict. c. 35, s. 16, Lord St Leonards' Act. as to wills taking effect since 13th August, 1859, where a testator charges his debts or any *legacy or specific sums*, and has not devised the estate to a trustee or trustees, the executor for the time being may sell or mortgage (*y*); and by the 23rd section, the purchaser or mortgagee * is not bound to see to the appli- [* 468] cation of the money, and it would seem that the executor is thus empowered to pass the legal as well as the equitable estate, for the clause proceeds that "any sale or mortgage under the Act shall operate only on the estate and interest, whether legal or equitable, of the testator, and shall not render it unnecessary to get in any outstanding subsisting legal estate." It must not escape notice that the power of sale is confined to the executor, the person whom the testator himself trusted, and is not extended to an administrator (*z*).

δ. Should a testator charge his debts on the real estate, and then devise the estate to A. and his heirs beneficially, and the devisee dies in the testator's lifetime; so that the estate descends, can the heir in this case sell and sign receipt? If the heir cannot sell where the estate was never devised, but left to descend, Charge of debts where the estate lapses.

(*u*) See Sugd. Powers, 129, 8th ed.

(*v*) 21 Beav. 337; and see Colyer v. Finch, 5 H. L. Cas. 922; Cook v. Dawson, 29 Beav. 123; Greetham v. Colton, 34 Beav. 615.

(*w*) See Tanqueray-Willaume and Landau, 20 Ch. D. 465.]

(*x*) Re Clay and Tetley, 16 Ch. D. 3.]

(*y*) Where one executor has renounced probate, the acting executors or executor for the time being may exercise the powers of this section, notwithstanding the will contains an express direction that the property shall be sold by the executors, Re Fisher and Haslett, 13 L. R. Ir. 546.]

(*z*) Re Clay and Tetley, 16 Ch. D. 3.]

* 7 LAW OF TRUSTS.

à fortiori he cannot in this case, for here not only the heir is not invested with the character of trustee under the will, but the estate, subject to the charge, was devised to another person, who was therefore intended to execute the implied trust. The machinery contemplated by the testator failed by the act of God, and no alternative remains but that the trusts should be executed by the Court (a). It is presumed that under these circumstances it could not be held that the executors have by the will even an *equitable* power of sale. The devisee, had he lived, would have been the proper person to execute the trust, and a power of sale cannot belong to the executors, as the testator could not be taken to have contemplated his own intestacy as to real estate.

Lord St. Leonards' Act.

However, by Lord St. Leonards' Act, 22 & 23 Vict. c. 35, ss. 16 & 23, as to wills coming into operation since 13th August, 1859, the executor may sell or mortgage and sign a receipt for the money.

Charge of debts where the estate is subjected to various limitations.

c. Suppose a testator to charge his debts, and to devise the estate to *A. for life, with contingent remainders or other limitations*, which render it impossible that the implied power of sale can be executed by the devisees. This has occurred in several cases (b), and the [* 469] * result appears to be that the Court, if it can possibly avoid it, will not construe the charge as a direction for a Chancery suit, but will assume that a power of sale for payment of the debts was given to some one, and that as it was not given to the devisees it must have been intended for the executors. In such a case the executors must be considered as having an *equitable* power of sale. The case in the Exchequer (c) directly decided that the executors have no power themselves to pass the *legal* estate. Where, in the case supposed, the executors take an implied equitable power of

(a) But see *Hardwick v. Mynd*, 1 Anst. 109; *Austin v. Martin*, 29 Beav. 523. The latter case may possibly be supported on the ground that the mortgagee, who had a power of sale and of signing receipts, was a party to the conveyance; but the reasoning of M.R., if correctly reported, is not satisfactory. How can it be said, for instance, that "the whole of the beneficial interest was vested in T. F. Stephens either in his character of heir-at-law or in his character of *legal personal representative*?" What beneficial interest in a testator's *freehold* estate can vest in his *personal representative*?

(b) *Gosling v. Carter*, 1 Coll. 644; *Eidsforth v. Armstead*, 2 K. & J. 333; *Wrigley v. Sykes*, 21 Beav. 337; *Bolton v. Stannard*, 4 Jur. N. S. 576; and see *Robinson v. Lowater*, 17 Beav. 592; 5 De G. M. & G. 272; *Sabin v. Heape*, 27 Beav. 553; *Greetham v. Colton*, 34 Beav. 615; *Hooper v. Strutton*, 12 W. R. 367.

(c) *Doe v. Hughes*, 6 Exch. 223.

sale upon the face of the will, it is immaterial whether the devised estates do or not lapse, except that the legal estate will, as the event happens, be in the devisees or in the heir-at-law. If a conveyance cannot be obtained, recourse must be had to the Trustee Acts for the transfer of the legal estate.

However, Lord St. Leonards' Act, 22 & 23 Vict. c. Lord St. Leonards' Act. 35, appears to apply to such a case, for though the devise is not to the trustees as required by the 14th section, yet it is a case within the 16th section, where "the whole estate and interest" of the testator "has not become vested in any trustee or trustees;" and it is presumed that the 18th section was meant to except from the Act devises to a person or body of persons taking the *fee-simple or fee-tail in præsentia free from executory limitations over*, and not devises of the fee-simple to several persons in succession for particular estates.

The true principle which, independently of the Act referred to, ought to govern these cases would appear to be, that where a testator devises the estate to trustees, or to a beneficiary, and charges his debts, there the trustees or the beneficiary should have a power of sale and signing receipts, but that where a testator charges his debts, and does not devise the estate, or devises it in such a manner that there is no one who can execute the trust, there the executor should have an equitable power of sale and signing receipts, and that the depositaries of the legal estate should be trustees for them, and bound to convey as they direct; but that where the testator has devised the estate, and therefore provided a hand to execute the trust, but the trustee or devisee dies in the testator's lifetime, there, as the hand to execute the trust has only failed by the act of God, no person has a power of sale or signing receipts, but the trust can only be executed by the Court.

16. It remains to notice in connection with [470] this subject the case of *Storry v. Walsh* (*d*), in which Sir J. Romilly, M.R. held in substance that a devisee, subject to a charge of debts and legacies, may, with the concurrence of the *executors* declaring that all debts and legacies have been paid, *sell for his own private purposes*, and give a good title to purchaser. This case resembles that of an executor, who is also specific or residuary legatee, selling a chattel interest for his own private debt (*e*). Storry v. Walsh.

[17. Before quitting this subject, however, it will be

(*d*) 18 Beav. 559; and see *Howard v. Chaffers*, 2 Dr. & Sm. 236

(*e*) See *infra*, as to receipts of executors, p. 479.

[Effect of
Settled Land
Act.]

proper to advert to the question whether the power of selling or mortgaging the property which arises under a charge of debts is affected by s. 56 of the Settled Land Act, 1882. That Act after giving large powers to the tenant for life, including a general power of sale, and a power of mortgaging for specific purposes, which do not include the payment of incumbrances on the settled property, and providing by s. 56, sub-s. 1, that powers given by the settlement to trustees, are not to be prejudicially affected by the Act, enacts in sub-s. 2, that "the consent of the tenant for life shall, by virtue of the Act be necessary to the exercise by the trustees of the settlement or other persons of any power conferred by the settlement exercisable for any purpose provided for in the Act," and the question is whether this makes the consent of the tenant for life necessary to the exercise by the trustees of a power of selling or mortgaging arising under a charge of debts. Now in the first place it seems clear that, as the only power of mortgaging given by the Act is of a very limited nature, and for purposes wholly dissimilar from those for which the power under the charge of debts is exercisable, the trustees' power of *mortgaging* is unaffected by sub-s. 2, and may be exercised without the concurrence of the tenant for life. With reference to the power of *sale*, there is more difficulty, as the tenant for life has a general power of selling, and under s. 21, the proceeds of the sale may be applied in discharging the incumbrances affecting the inheritance of the settled land. The sale of the settled property or a part thereof for the purpose of paying off the incumbrances seems, therefore, to be strictly a "purpose provided for in the Act," and it is difficult construing the Act fairly to avoid the conclusion that the trustees cannot sell without the consent of the tenant for life. The result of this construction of the Act is without doubt inconvenient, and the view that the power of sale arising under a charge of debts is unaffected by the 56th section [* 471] is supported by * weighty opinions (*f*), but until that view has received the sanction of the Court a purchaser could not be safely advised to accept a title from the trustees without the consent of the tenant for life (*g*).]

[(*f*) See Wolstenholme and Turner's Settled Land Act, 2nd Ed. p. 70.]

[(*g*) As to the meaning of the term "tenant for life," and the limited owners who have the powers of a tenant for life, see sect. 2, 58 and 62; and see also *post*, chap. xxiii. s. 2, v.]

18. As the trust for sale is a joint office, the receipt must be signed by *all the trustees* who have undertaken to act. And where a *power* is given to trustees to discharge the purchaser from seeing to the application of his purchase-money, the receipt must be signed even by a trustee who has parted with the estate by a conveyance to his co-trustees; for the transfer of the estate at law carries not along with it the confidence in equity (*h*). But the receipt need not be signed by a trustee who has *disclaimed*, for by the effect of disclaimer the acting trustees are put exactly in the same plight as if the renouncing trustee had never been mentioned (*i*).

Who must sign the receipt.

19. As a trust cannot be *delegated*, it follows that if A. and B. be trustees for payment of debts, and they convey the estate to C. upon the like trusts, the purchaser could not safely pay his purchase-money upon the receipt of C. In *Hardwick v. Mynd* (*k*), the executors and trustees renounced probate, and (probably with the intention of disclaiming) conveyed the estate to C., the heir-at-law; and certain mortgages made by C. were upheld. It might have been argued that as the trustees, by disclaiming, vested the estate in the heir, he was properly the trustee to sell or mortgage. It would be difficult, however, to maintain that the heir under such circumstances could sign a receipt, and certainly the Court did not put it upon that ground, but said that the mortgages if made by the trustees would have been good, and that they were in fact made by them, as they had deputed C. to act for them in the trust. Such a doctrine, however, at the present day could not be sustained.

Power to sign receipts in one, and delegation to another

20. As a general rule, where a special *discretionary* or *arbitrary* power was given to trustees, and the settlement contained no proviso for the appointment of new trustees with similar powers, it was not competent for the Court, [prior to the recent Acts,] on the substitution of new trustees by its own inherent jurisdiction, to invest such trustees with that arbitrary power. But in a trust for * sale an authority to sign receipts is not a mere power, but enters into the substance of the trust; that is, it is so interwoven with the trust itself that there can be no execution of the trust without the accession of the power; and in such cases the appointment of new trustees by the Court may be taken

Power of signing receipts, as regards trustees appointed by the Court.

(*h*) *Crewe v. Dicken*, 4 Ves. 97.

(*i*) *Adams v. Taunton*, 5 Mad. 435; *Hawkins v. Kemp*, 3 East, 410; *Smith v. Wheeler*, 1 Vent. 128.

(*k*) 1 Anst. 109; and see *Lord Braybrooke v. Inskip*, 8 Ves. 432.

to have included the power. Thus, suppose A. and B. are trustees of an estate to sell for payment of debts, and at the death of A. and B. the Court appoints C. and D. upon the like trusts; if C. and D. cannot sign receipts, they cannot sell, and their appointment as trustees is nugatory (*l*). [But now, by recent Acts (*m*), trustees appointed by the Court have "the same powers, authorities, and discretions, and may in all respects act" as if originally appointed by the instrument creating the trust.]

Receipt after
a breach of
trust.

21. It sometimes happens that the trustees *had* clearly at first a power of signing receipts, but subsequently, by a *breach of trust* or some irregularity in the administration of the estate, the fund has got out of its proper channel, and the question arises, whether, if the person who ought never to have had possession of the fund intend to restore it to its proper state, the trustees can sign a receipt. It may be said that as the power never contemplated a breach of trust, it would not be safe to consider the exercise of the power as an indemnity, if the money cannot be properly paid to the trustees upon any other ground; on the other hand, if the fund be reinstated *in specie*, so that it is standing in the exact form in which the trust required it, and in the names of the persons whom the settlement appointed the trustees, how can it be said that in such a state of things any liability can remain? (*n*).

(*l*) See *Drayson v. Pocock*, 4 Sim. 283; *Byam v. Byam*, 19 Beav. 58; *Bartley v. Bartley*, 3 Drew. 385; *Lord v. Bunn*, 2 Y. & C. C. C. 98. As to the powers generally of trustees appointed by the Court, see *post*, ch. xxiii, s. 2.

(*m*) 23 & 24 Vict. c. 145, s. 27; since repealed and its place supplied by 44 & 45 Vict. c. 41, s. 33; and see *post*, Chap. xxiii, s. 2.

(*n*) See *Lander v. Weston*, 3 Drew. 389; *Hanson v. Beverley*, Sugd. Vend. & Purch. 848, 11th edit. In *Carver v. Richards*, A. & B. were trustees of Mrs. Warren's settlement, dated 31st May, 1825, which contained a power of investing the trust fund on a mortgage of lands of *inheritance in fee simple*, with the usual receipt clause. On 27 July, 1826, the trustees invested 1200*l.* on a mortgage of a *term of 500 years*. On the 23 November, 1844, the owner of the fee subject to the term paid the 1200*l.* to A. and B. who assigned the term to attend, and the receipt of A. and B., notwithstanding the breach of trust, was held to be sufficient. M. R. 10 December, 1859. The defendants appealed from the decree upon other points, and also included this, but wanted the courage to argue it at the hearing. It not unfrequently happens that trustees without any sufficient power lay out trust money in the purchase of real estate, and then the question arises whether when they want to sell again they can make a good title. The case may be provided for by a special condition of sale or the sanction of the Court may be obtained in a suit for the pur-

* 22. Where the trust estate is *in mortgage*, and [* 473] the money receivable by the trustees is applicable either wholly or in part in payment of the mortgage, of course the trustees may sell and sign a receipt for the difference, or, if there be no surplus beyond the mortgage, may sell without signing any receipt; for the circumstances to which the receipt clause was meant to apply, have, in one case, arisen only partially, and in the other not at all.

Sale where no money is to be received by the trustees.

23. Where the trustees have a power of signing receipts, it has been held not to be necessary that the trustees, who sign the receipts, should themselves actually receive the money, provided it be paid to some person by their direction, and the transaction do not on the face of it imply a breach of trust (*o*). Thus, where the purchase-money was expressed in the deed to be paid to the trustee, and a receipt by the trustee was endorsed, but in fact the money was paid, by the direction of the trustee, to the tenant for life; Lord Romilly, M.R., said, that the purchaser was bound to pay the money as the trustee directed (*p*), and having obeyed that direction was exonerated from the consequences. Various transactions might have occurred between the trustee and the *cestuis que trust* (such as the execution of a previous mortgage on sufficient security), which would make such a payment perfectly legitimate (*q*). The Court in this case was protecting a *bonâ fide* purchaser, and the principle here laid down must be ap-

Hope v. Liddell.

pose: see *Robinson v. Robinson*, 10 Ir. Rep. Eq. 189. [But it has been held in a recent case that upon the purchase-money being invested by the trustees on the securities authorized by the instrument creating the trust, and on one of the *cestuis que trust* concurring in the sale to show that they had not all elected to take the real estate as realty, the purchasers will have a good title from the trustees: *Re Patten and Guardians of the Edmonton Union*, 52 L. J. N. S. Ch. 787.]

[(*o*) In *Re Flower and Metropolitan Board of Works*, 27 Ch D. 592, Kay, J., seems to have been of opinion that such a transaction necessarily implied a breach of trust; but see *ante*, p. 292. However, in the present state of the authorities no trustee can be advised to allow his co-trustee to receive trust money unless the circumstances of the case render it necessary.]

[(*p*) But see as to this *Re Bellamy and Metropolitan Board of Works*, 24 Ch. D. 387; *Re Flower and Metropolitan Board of Works*, 27 Ch. D. 592, where it was held that the purchaser could not be compelled to pay to the nominee of the trustees or even to one of the trustees by the direction of the others, and see *ante*, p. 447, 448.]

(*q*) *Hope v. Liddell*, 21 Beav. 202-3; and see *Locke v. Lomas*, 5 De G. & Sm. 326; *M'Carogher v. Whieldon*, 34 Beav. 107; [*Ferrier v. Ferrier*, 11 L. R. Ir. 56;] but see *Pell v. De Winton*, 2 De G. & J. 13.

plied with great caution. A purchaser who has paid his money to another by the direction of the trustee may be protected under the special circumstances of the case, but no purchaser who has the money still in his pocket can be [*474] advised to pay it to any other than the trustee * or his duly authorized agent (r); [and in the present state of the authorities the most prudent course is to pay it to the trustee *personally*, and if there are more trustees than one to pay it in the presence of all the trustees, or else to pay it into a bank to their joint account (s).]

Receipts for
money extra-
neous to
trust.

Feme covert.

24. A power of signing receipts in a settlement will extend only to what the trustees are by the settlement authorized to receive (t).

25. When one of the trustees is a *married woman*, the questions arise, can she by virtue of the power sign a receipt without the concurrence of her husband, who is answerable for her acts; and ought the money to be paid to herself, or to her husband who on the one hand is answerable for her acts, but on the other hand is not the person pointed out by the settlement as the hand to receive it? It would appear on principle that the money cannot be paid to the husband, who is a stranger, and the safest course would be to pay the money into some responsible bank in the joint names of the trustees (excluding the husband), and to take a written receipt from the trustees, to be also signed by the husband as sanctioning the receipt by the wife (u). [The concurrence of the husband may however be dispensed with if he has abjured the realm or is an outlaw (v), and where a married woman who is a trustee sues under Order 16, Rule 16, without her husband, she can give a good discharge for the money recovered under the judgment without his concurrence (w). And where the marriage has taken place since the 31st December, 1882, or the trust has been undertaken by the married woman since that date, she can sign a receipt for the money, without the concurrence of her husband who is not answerable for her acts unless he intermeddle in the trust (x).]

(r) [*Re Bellamy and Metropolitan Board of Works*, 24 Ch. D. 387; *Re Flower and Metropolitan Board of Works*, 27 Ch. D. 592; and] see *Re Fishbourne*, 9 Ir. Eq. Rep. 340; and *ante*, p. 447, 448.

(s) See *ante*, p. 447, 448.

(t) *Pell v. De Winton*, 2 De G. & J. 20, *per Cur.*

(u) See *Kingsman v. Kingsman*, 6 Q. B. D. 122, 128, 131.]

(v) Per Lord Selborne, L. C., *Kingsman v. Kingsman*, 6 Q. B. D. 122, 128.]

(w) *Kingsman v. Kingsman*, *ubi sup.*]

(x) 45 & 46 Vict. c. 75, ss. 1, 2, 5, 24; see *ante*, p. 36.]

26. If the trustees of an estate bound by a contract for sale of a date prior to the trust deed execute a conveyance to the purchaser and sign a receipt indorsed, and leave the deed in the hands of the solicitor of the settlor who had contracted to sell, and the solicitor completes the sale and receives the purchase-money and misapplies it, the trustees are personally liable to the *cestuis que * trust*, as having improperly enabled [* 475] the solicitor of a third person to get possession of the fund (y).

Solicitor receiving purchase-money.

27. The following observations of Lord St. Leonards upon the subject of trustees' receipts, deserve every attention. "Where," he says, "a purchaser is bound to see the money applied according to the trust, and the trust is for payment of *debts or legacies*, he must see the money actually paid to the creditors or legatees. In cases of this nature, therefore, each creditor or legatee, upon receiving his money, should give as many receipts as there are purchasers, so that each purchaser may have one; or if the creditors or legatees are but few they may be made parties to the conveyance. Another mode by which the purchaser may be secured is an assignment by all the creditors and legatees of their debts and legacies to a trustee, with a declaration that his receipts shall be sufficient discharges, and then the trustee can be made a party to the several conveyances. Sometimes a bill is filed for carrying the agreement into execution, when the purchase-money is of course directed to be paid into Court; and this is the surest mode, because the money will not be paid out of Court without the knowledge of the purchaser" (z).

Practical directions where no power to sign receipts.

28. From the preceding discussion the fundamental principle may be collected, that (where no Act of Parliament applies(a)) *a purchaser is in all cases bound to see to the application of his purchase money, unless a positive intention to the contrary on the part of the settlor be either expressed or implied in the instrument creating the trust.* Such indeed is the conclusion to which the authorities conduct us; but, independently of precedent, it might be suggested that the better principle would be, that, *prima facie*, a direction to sell should imply in all cases a power of signing discharges; but that where it was practicable, and no impediment to

(y) *Ghost v. Waller*, 9 Beav. 497: and see *Wood v. Weightman*, 13 L. R. Eq. 434; *West v. Jones*, 1 Sim. N. S. 205.

(z) *Vend. & Purch.* 848, 11th edit.

(a) See 22 & 23 Vict. c. 35, s. 23; 23 & 24 Vict. c. 145, s. 29; [44 & 45 Vict. c. 41, s. 36,] referred to *ante*.

*Cestui que
trust abroad.*

the execution of the trust was thereby created, the purchaser should pay his money directly to the party beneficially entitled. The distinction between the two principles is very material. According to the former rule, if a trust be created for payment of debts and legacies, and the debts be paid, and then the trustees sell, though the purchaser has notice of all debts having been discharged, he is nevertheless not bound to see to the application of his purchase-money, because there was an implied intention by the settlor that the receipts of trustees should be sufficient acquittances (b); but, by [* 476] the * operation of the latter rule, the purchaser *would* be bound, for the necessity of his paying the money immediately to the legatees would not, if they were of age, prevent the completion of the sale, and therefore there is no reason why the purchaser should be exempted from seeing to the application. Again, suppose a trust for sale, with a direction to distribute the proceeds between A., B., and C., and that, after the date of the instrument, C. quits the country or cannot be found. According to the first principle, as the absence of C. was not an event in the contemplation of the settlor, and no inference can be drawn that he meant the trustees to sign receipts, it follows that the sale is rendered impossible, and the contradiction arises, that the settlor having in *express terms* directed a sale, and it being admitted that the will of the settlor is authoritative, yet the execution of that intention is intercepted by the construction of equity. "It were difficult," says Lord St. Leonards, "to maintain that the absence of a *cestui que trust* in a foreign country should, in a case of this nature, impede the sale of the estate" (c), and yet to such a result the rule in question, if there be no exception to it, would apparently lead. But according to the other principle suggested, no such obstacle arises. The receipts of the trustees would then *prima facie* be discharges, as necessary to the execution of the sale; and as C. is not at hand, the purchaser in respect of C.'s share in the purchase-money could not be called upon to observe a rule which would interpose a bar to the accomplishment of the expressed purpose of the settlor (d).

[29. If a person is interested in property in several

(b) See *supra*, pp. 458, *et seq.*

(c) Sugd. Vend. & Purch. 844, 11th ed.; and see *Forbes v. Peacock*, 12 Sim. 544; *Ford v. Ryan*, 4 Ir. Ch. Rep. 342.

(d) Receipts of trustees are now in most cases made sufficient discharges by Act of Parliament, see *ante*, p. 451, 452.

capacities, and in one of such capacities can give a valid discharge for the purchase-money on the sale of the property, a purchaser who has no notice of an intended misapplication by such person of the purchase-money will be discharged by his receipt (*e*), and it is immaterial that the conveyance does not show that the vendor is selling or receiving the purchase-money in the capacity in which he is empowered to do so; and where a person was both executrix and trustee, and as such executrix and trustee had power to carry out a transaction which she purported to carry out as a trustee in which capacity she had not the power, it was held that the transaction was validly effectuated (*f*).]

* 30. *As *executors* are to a certain extent [* 477] Receipts of executors. invested with the character of trustees, it may be proper to introduce a few remarks upon their powers in disposing of the assets.

On the death of a testator the personal estate vests wholly in the executor, and to enable him to execute the office with facility, the law permits him, with or without the concurrence of any co-executor (*g*), to sell or even to mortgage (*h*),¹ by actual assignment or by equitable deposit (*i*), with or without a power of sale (*k*), all or any part of the assets, legal or equitable (*l*);² and though liable to render an account to the Court, he cannot be interrupted in the discharge of his office by any person claiming either *dehors* the will, as

Power to sell or mortgage.

[(*e*) *Corser v. Cartwright*, 7 L. R. H. L. 731; *West of England and South Wales District Bank v. Murch*, 23 Ch. D. 138.]

[(*f*) *West of England and South Wales District Bank v. Murch*, *ubi supra*.]

(*g*) *Scott v. Tyler*, 2 Dick. 725, *per* Lord Thurlow; *Smith v. Everett*, 27 Beav. 446; *Shep. Touch.* 484; *Murrell v. Cox and Pitt*, 2 Vern. 570; *Fellows v. Mitchell*, 2 Vern. 515; *Doe v. Stace*, 15 M. & W. 623; *Dyer*, 23, a.; and see *Sneesby v. Thorne*, 7 De G. M. & G. 399.

(*h*) *Bonnie v. Ridgard*, 1 Cox, 145, *see* 148; *Scott v. Tyler*, 2 Dick. 727, *per* Lord Thurlow; *Mead v. Orrery*, 3 Atk. 230, *per* Lord Hardwicke; *Andrew v. Wrigley*, 4 B. C. C. 138, *per* Lord Alvanley; *M'Leod v. Drummond*, 17 Ves. 154, *per* Lord Eldon; *Keane v. Roberts*, 4 Mad. 357, *per* Sir J. Leach; and see *Humble v. Bill*, 2 Vern. 444; *Sanders v. Richards*, 2 Coll. 568; *Miles v. Durnford*, 2 De G. M. & G. 641.

(*i*) *Scott v. Tyler*, 2 Dick. 725, *per* Lord Thurlow; and see *M'Leod v. Drummond*, 14 Ves. 360; *S. C.* 17 Ves. 167; *Ball v. Harris*, 8 Sim. 485.

(*k*) *Russel v. Plaice*, 18 Beav. 21; and *see* p. 426 *supra*.

(*l*) *M'Leod v. Drummond*, 14 Ves. 360, *per* Sir W. Geant; *Nugent v. Gifford*, 1 Atk. 463.

¹ *Petrie v. Clark*, 11 S. & R. 377; *Field v. Schieffelin*, 7 Johns Ch. 150.

² *Shaw v. Spencer*, 100 Mass. 392.

Notice of the will.

a creditor, or under it, as a legatee. The *creditor* has merely a demand against the executor personally (*m*), the *pecuniary* or *specific legatee* is not entitled to the legacy or bequest until the executor has assented (*n*), and the *residuary legatee* has no lien until the estate has been liquidated and cleared of all liabilities, both *dehors* and under the will (*o*).¹ Upon the sale of the chattel, the purchaser is not concerned to see to the application of his purchase-money, and it need not be recited in the conveyance that the money is wanted for the discharge of liabilities (*p*): it is sufficient that the purchaser trusts him whom the testator has trusted (*q*): if there be any misapplication, the remedy of the creditor or legatee is not against the purchaser, but the executor (*r*).² It is impossible for the purchaser to ascer- [* 478] tain the necessity of the sale, for this * must depend upon the state of the accounts, which he has no means of investigating without the powers annexed only to the executorship (*s*). Even express notice of the will, and of the bequests contained in it, works to the purchaser no prejudice; for "every person," said Sir J. Leach, "who deals with an executor has necessarily implied if not express notice of the will: but as a purchaser of real estate devised in aid for payment of debts is not bound to inquire into the fact whether the sale is made necessary by the existence of debts, because he has no adequate means to prosecute such an inquiry, so he who deals for personal assets is, for the same reason, absolved from all inquiry with respect to debts: and it is upon this principle altogether indifferent what dispositions may be made in the will with respect to the personal property for which he deals; for whether

(*m*) *Nugent v. Gifford*, 1 Atk. 463, *per* Lord Hardwicke; *Mead v. Orrery*, 3 Atk. 238, *per eundem*; *M'Leod v. Drummond*, 17 Ves. 163, *per* Lord Eldon.

(*n*) *Mead v. Orrery*, 3 Atk. 238, 240, *per* Lord Hardwicke. But the executor is bound to assent as soon as the funeral and testamentary expenses and debts have been paid, *Greene v. Greene*, 3 I. R. Eq. 102, *per Cur.*

(*o*) *M'Leod v. Drummond*, 17 Ves. 163, 169, *per* Lord Eldon; and see *Mead v. Orrery*, 3 Atk. 238, 240.

(*p*) *Bonney v. Ridgard*, 1 Cox, 148, *per* Lord Kenyon.

(*q*) *Id.*

(*r*) *Humble v. Bill*, 2 Varn. 445, *per Cur.*; *Ewer v. Corbet*, 2 P. W. 149, *per* Sir J. Jekyll; *Watts v. Kancie*, Toth. 77; *Nurton v. Nurton*, *id.*

(*s*) *Ewer v. Corbet*, 2 P. W. 149, *per* Sir J. Jekyll; *Humble v. Bill*, 2 Vern. 445, *per Cur.*; *Nugent v. Gifford*, 1 Atk. 464, *per* Lord Hardwicke; *Mead v. Orrery*, 3 Atk. 242, *per eundem*.

¹ *Ibid.*

² *Pa. Ins. Co. v. Austen*, 42 Pa. St. 257.

it be specifically given or be part of the residuary estate, it is equally available in law for the payment of debts" (t).

Thus nothing can be clearer than that an executor may go to market with his testator's assets, (even with a chattel specifically bequeathed (u),) and the purchaser will not be bound to see to the application of his purchase-money (v).

[But an executor or administrator cannot mortgage the assets to raise money for repairing or re-instating dilapidated buildings unless the testator or intestate was liable under covenants to execute the works (w).]

31. But *fraud* and *collusion* will vitiate any transaction, and turn it to a mere color (x), and therefore if fraud be proved, either expressed or implied, the parties cannot protect themselves by pleading the general rule (y).¹ The only question is, What will amount to a case of fraud ?

* a. The sale cannot stand if the chattel be [* 479] sold at a nominal price or a fraudulent undervalue (z).

β. The executor may not sell or pledge the assets for raising money to carry on the testator's business, though in pursuance of the directions contained in his will, for the debts of the business are not the testator's debts, [and a direction by a testator that his trade shall be carried on by his executors does not authorize the employment in that trade of more of the testator's prop-

Fraud an exception.

Sale at a nominal price.
Sale by executor for payment of his own debt.

(t) Keane v. Robarts, 4 Mad. 356.

(u) Watts v. Kancie, Toth. 77, 161; Nurton v. Nurton, Ib.; Ewer v. Corbet, 2 P. W. 148. As to Humble v. Bill, 2 Vern. 444, 1 B. P. C. 71, see Ewer v. Corbet, *ubi supra*; Andrew v. Wrigley, 4 B. C. C. 137; M'Leod v. Drummond, 17 Ves. 160.

(v) Bonney v. Ridgard, 1 Cox, 147, *per* Lord Kenyon.

[(w) Ricketts v. Lewis, 51 L. J. N. S. Ch. 837.]

(x) Scott v. Tyler, 2 Dick. 725, *per* Lord Thurlow.

(y) Watkins v. Cheek, 2 S. & S. 205, *per* Sir J. Leach; M'Leod v. Drummond, 17 Ves. 154, *per* Lord Eldon; Hill v. Simpson, 7 Ves. 166, *per* Sir W. Grant; Taner v. Ivie, 2 Ves. 469, *per* Lord Hardwicke; Keane v. Robarts, 4 Mad. 357, *per* Sir J. Leach; Crane v. Drake, 2 Vern. 616; Nugent v. Gifford, 1 Atk. 463, *per* Lord Hardwicke; Mead v. Orrery, 3 Atk. 240, *per eundem*; Scott v. Tyler, 2 Dick. 725, *per* Lord Thurlow; Whale v. Booth, 4 T. R. 625, note (a), *per* Lord Mansfield; Elliot v. Merryman, Barn. 81, *per* Sir J. Jekyll; Bonney v. Ridgard, 1 Cox, 147, *per* Lord Kenyon; Earl Vane v. Rigden, 5 L. R. Ch. App. 663, &c.

(z) Scott v. Tyles, 2 Dick. 725, *per* Lord Thurlow; Ewer v. Corbet, 2 P. W. 149, *per* Sir J. Jekyll; M'Mullen v. O'Reilly, 15 Ir. Ch. Rep. 251; and see Drohan v. Drohan, 1 B. & B. 185.

¹ Miller v. Williamson, Md. 219; Williams v. Branch, 7 Bank Ala. 906.

erty than was employed by him in his business] (a), or to pay or secure the executor's own debts (b),¹ or for a debt *wrongfully contracted* by him as executor (c), for *primâ facie* this is a diversion of the assets to a purpose wholly foreign to the administration, and therefore a *devastavit*. "Though," observed Sir W. Grant, "it may be dangerous at all to restrain the power of purchasing from the executor, what inconvenience can there be in holding that the assets known to be such should not be applied in any case for the *executor's debt*, unless the creditor could be first satisfied of his right? It may be essential that the executor should have the power to *sell* the assets, but it is not essential that he should have the power to pay his own creditor; and it is not just that one man's property should be applied to the payment of another man's debts" (d).

Where the executor is specific or residuary legatee.

But if the executor *be also the specific (e), or residuary legatee (f)*, then it seems to be established upon the authority of several cases that he *may* dispose of the chattel in payment of his own debt, for as soon as the debts and legacies of the testator have been discharged, the property is the executors'; and how is a purchaser to ascertain, but from the mouth of the executor, whether such prior liabilities upon the estate have been fully satisfied?

Where the executor is

[* 480] * But if the executor is specific or residuary legatee, *jointly with others, or subject to certain charges*

(a) *McNeillie v. Acton*, 2 Eq. Rep. 21; 4 De G. M. & G. 744. [But the executors may sell or pledge any part of the property actually employed in the business, and it has been held in a recent case in Ireland that the power of disposition extends to mortgaging the freehold premises upon which the business is carried on; *Devitt v. Kearney*, 13 L. R. Ir. 45; reversing S. C. 11 L. R. Ir. 225.]

(b) *Scott v. Tyler*, 2 Dick. 712; *Hill v. Simpson*, 7 Ves. 152; *Watkins v. Cheek*, 2 S. & S. 205, *per* Sir J. Leach; *Keane v. Roberts*, 4 Mad. 357 *per cundem*; *Crane v. Drake*, 2 Vern. 616; Anon. case, cited Pr. Ch. 434; *Andrew v. Wrigley*, 4 B. C. C. 137, *per* Lord Alvanley; and see *Eland v. Eland*, 4 M. & Cr. 427; *Miles v. Durnford*, 2 De G. M. & G. 641; [*Jones v. Stöhwasser*, 16 Ch. D. 577.]

(c) *Collinson v. Lister*, 20 Beav. 356; 7 De G. M. & G. 634.

(d) *Hill v. Simpson*, 7 Ves. 169.

(e) *Taylor v. Hawkins*, 8 Ves. 209.

(f) *Nugent v. Gifford*, 1 Atk. 463; corrected from Reg. Lib. 4 B. C. C. 136; *Mead v. Orrery*, 3 Atk. 235; *Whale v. Booth*, 4 T. R. 625, note (a). See the comments of Lord Eldon, *M'Leod v. Drummond*, 17 Ves. 163; and see *Bedford v. Woodham*, 4 Ves. 40, note; *Storry v. Walsh*, 18 Beav. 559.

¹ *Miller v. Williamson*, 5 Md. 219; *Williamson v. Morton*, 2 Md. Ch. 94; *Williams v. Branch Bank*, 7 Ala. 986; *Pendleton v. Fay*, 2 Paige, 202.

under the will, then he has no power by himself to offer the chattel in payment of his own debt. For in what character does the executor sell? It must be either as executor or as legatee; not as executor, for then he cannot pay his own debt with the testator's assets; and not as legatee, for he is not exclusively such, but only jointly with others, or subject to certain charges. The creditor therefore cannot deal for the chattel without the concurrence of the co-legatees, or of the other persons jointly entitled (*g*). And the mere representation by the executor that he is absolute owner under the will is no protection, for common prudence requires that the purchaser should look to the will himself and ascertain the fact; and if he neglect this precaution, and assume the executor's veracity, he must incur the hazard of the executor's falsehood (*h*).

The executor in his character of specific or residuary legatee cannot pay or secure the debt of his own creditors out of the testator's assets, if such creditor have *express* notice that any debt of the testator still remains unsatisfied (*i*). Express notice that debts not paid.

γ. If the executor sell or mortgage for money either advanced at the time or to be advanced, the dealing *prima facie* is in a due course of administration (*k*). "Where," observed Sir W. Grant, "a party having a debt due to him by the executor takes, in satisfaction of that debt, the assets which he knows belong to the executor only in that character, undoubtedly suspicion of fraud must always arise; but where a man is applied to for a loan of money there is no motive of fraud, for he may keep his money if not satisfied with the security" (*l*). But such is the *prima facie* presumption only, for if there be legal evidence to the purchaser or mortgagee that the immediate or future advance is not on account of the testator's estate, but is meant to be applied to the private purposes of the executor, the Court must regard the transaction as fraudulent, and will not allow it to stand (*m*).¹ Sale by executor for other private purposes.

(*g*) *Bonney v. Ridgard*, 1 Cox, 145; *Hill v. Simpson*, 7 Ves. 152, see 170; and see *Haynes v. Forshaw*, 11 Hare, 93.

(*h*) *Hill v. Simpson*, 7 Ves. 152, see 170.

(*i*) See *Nugent v. Gifford*, 1 Atk. 464; *Whale v. Booth*, 4 T. R. 625, note (*a*); *M'Leod v. Drummond*, 17 Ves. 163.

(*k*) *M'Leod v. Drummond*, 17 Ves. 155, *per* Lord Eldon.

(*l*) *M'Leod v. Drummond*, 14 Ves. 362; and see *Miles v. Durnford*, 2 De G. M. & G. 641.

(*m*) *M'Leod v. Drummond*, 14 Ves. 353; S. C. reversed 17 Ves.

¹ *Pendleton v. Fay*, 2 Paige, 202; *Jaudon v. Nat. City Bank*, 8 Blatchf. 431; *Bayard v. Farmers & Mechanics' Bank*, 52 Pa. St. 222.

Sale of specific chattel, and notice that there are no debts.

δ. A purchaser cannot deal with an executor for the purchase * of a chattel specifically bequeathed, if the purchaser have notice, (a fact, however, not easily to be proved, and not lightly to be presumed,) that there were no debts of the testator, or that they have since been discharged (n).

Payment to executor who will probably misapply it.

ε. If a person owe money to a testator's estate, and be apprised that the executor *means to misapply it*, he cannot safely hand it over (o)¹.

Payment after long interval from testator's death.

ς. If a great *length of time* has elapsed since the testator's death, it may be argued that here all debts must be *presumed* to be paid, and that the executor is a trustee for the next of kin, and that the money cannot be paid safely to any other than the next of kin as the *cestui que trust*. However, in the absence of all *mala fides* the executor's receipt will in general be sufficient. Where there had been a lapse of sixteen years, Lord Hatherley observed, "there is no authority for holding that merely because a debt to the testator's estate is not called in for some time, we are to imply that the executors have ceased to be executors, and have become trustees. A debtor who has been paying interest for perhaps twenty years, does not therefore become cognizant of the fact of all the testator's estate having been administered, and of the executors having become trustees. The persons with whom the executors are dealing, are not bound to know the state of the testator's assets, and it may be many years before all his debts are paid, and his estate wound up" (p). In a case where there had been a lapse of *thirty-five years* from the testator's death, and no allegation of debts, the late V. C. of England held that the executor could sign a receipt (q), [but the rule has now been adopted that

152; *Scott v. Tyler*, 2 Dick. 712, compare 17 Ves. 166; and see *Keane v. Robarts*, 4 Mad. 358.

(n) *Ewer v. Corbet*, 2 P. W. 149, *per* Sir J. Jeykil; and see *M'Mullen v. O'Reilly*, 15 Ir. Ch. Rep. 251.

(o) See *Watkins v. Cheek*, 2 S. & S. 199; *Eland v. Eland*, 4 M. & Cr. 427; *Stroughill v. Anstey*, 1 De G. M. & G. 648.

(p) *Charlton v. Earl of Durham*, 4 L. R. Ch. App. 438; and see *Sabin v. Heape*, 27 Beav. 553.

(q) *Gough v. Birch*, July 10, 1839, MS.; see *Stroughill v. Anstey*, 1 De G. M. & G. 654; [*Re Tanqueray-Willame and Landau*, 20 Ch. D. 465; *Re Molyneux and White*, 13 L. R. Ir. 382;] *Ewer v. Corbet*, 2 P. W. 148; *Court v. Jeffery*, 1 S. & S. 105; *Orrok v. Binney*, Jac. 523; *Pierce v. Scott*, 1 Y. & C. 257; *Forbes v. Peacock*, 11 Sim. 152; *Hawkins v. Williams*, Q. B. 10 W. R.

¹ *Garrard v. Railroad Co.*, 5 Casey, 154; *Railway Co. v. Barker*, ib. 160; *Shaw v. Spencer*, 100 Mass. 387; *Champlin v. Haight*, 10 Paige, 274; *Williamson v. Morton*, 2 Md. Ch. 94.

after *twenty years* it is fair to presume that the debts have been paid and the onus is upon the executors to show such is not the case (r).] As regards an *administrator* it will be remembered that all necessary protection is thrown around the estate by the bond taken for due administration, and also by the form of proceeding in the Probate Court; for if A., (to * whose [* 482] estate the money is owing) die, leaving B. his next of kin, who afterwards dies, leaving C. his next of kin, who afterwards dies, leaving D. his next of kin, in order to take out letters of administration to A., you must first show yourself to have an interest by taking out letters to B. And again, to take out letters to B. you must first, for the same reason, take out letters to C.; so that, in fact, letters cannot be taken out to A. without previously taking out letters to B. and C. If, in such a case, the receipt of A.'s administrator, even after the lapse of twenty years, were not sufficient, it would be necessary in a suit to make the administrators of B. and C. parties as *cestuis que trust*, a thing quite unheard of in practice. In an extreme case, however, where an administrator who was beneficially entitled to one-fourth, filed a bill *one hundred and fifty years* after the intestate's decease, the Court, while it admitted the plaintiff's legal title to the whole, refused to order payment to him of the other three-fourths, which apparently belonged in equity to other parties (s).

5. An *agent* is accountable to his principle only, and therefore if an executor employ a banker to sell out part of the testator's stock and remit the proceeds to him, it seems the banker, though he has reason to believe that a misapplication is intended, is bound to transfer the money to the executor, and does not thereby render himself accountable. A contrary doctrine would carry the principle of constructive trust to an inconvenient and, indeed, to an impracticable length (t); [and an

Sale by
banker by
direction of
executor.

692; *Greetham v. Colton*, 6 N. R. 311; *Williams v. Massy*, 15 Ir. Ch. Rep. 68.

[(r) *Re Tanqueray-Willaume and Landau*, 20 Ch. D. 465; *Re Molyneux and White*, 13 L. R. Ir. 382.]

(s) *Loy v. Duckett*, Cr. & Ph. 305. [In a recent case, in 1885, where stock standing in the name of an owner, who died in 1791, had been transferred to the Commissioners for the reduction of the National Debt, and an inquiry was directed upon petition who were the persons entitled to the fund, the Court directed that the beneficial title should be inquired into as regarded all the shares to which the legal personal representatives of persons who died before 1871 were entitled; *Ex parte Roskrow*, W. N. 1885, p. 3.]

(t) *Keane v. Robarts*, 4 Mad. 332, see 356, 359; and see *Davis*

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[* 483] agent is bound to accept as correct the * trustees' statement as to the intended application of the fund (*u*).] But an agent who derives a *personal benefit* from the breach of trust of his principal will be accountable (*v*).

Sale before
probate.

7. Though an executor *can* make an assignment and give a receipt for purchase-money before *probate*,¹ yet a purchaser is not *bound to pay* his purchase-money before probate, which is the evidence of the executor's title (*w*).

[Payment by
order of
executor.]

[32. If a person indebted to a testator's estate pays a third party by order of the executor and obtains the

v. Spurling, 1 R. & M. 64; S. C. Taml. 199; London Chartered Bank of Australia *v. Lemprière*, 4 L. R. P. C. 585; [The New Zealand and Australian Land Company *v. Watson*, 7 Q. B. D. 374; reversing S. C. 5 Q. B. D. 474;]. *Crisp v. Spranger*, Nels. 109; *Saville v. Tancred*, 3 Sw. 141, note; *Ex parte Barnwell*, 6 De G. M. & G. 801; *Gray v. Johnston*, 3 L. R. H. L. 1. In this case, before the House of Lords, the doctrine as laid down by Lord Cairns was, that on the one hand bankers were not on grounds of mere suspicion or curiosity, to refuse to honour the cheque of an executor or trustee, being their customer, and on the other hand, that bankers were not, under shelter of that title, to be at liberty to become parties or privies to a breach of trust, and to pay away trust money when they *knew* it was going to be misapplied, and for the purpose of its being so misapplied; and he stated the result of the cases to be, that to justify a banker in refusing payment, 1. There must be a misapplication or breach of trust actually intended. 2. The bankers must be privy to such intended misapplication or breach of trust, and 3. That any personal benefit to the bankers designed or stipulated for, would be the strongest evidence of such privy, *Ib.* p. 11. But the principle enunciated by Lord Westbury went further, for he said that a banker could not be allowed to set up the *jus tertii* against the order of his own customer, or refuse to honour his draft on any other ground than some sufficient one resulting from the act of the customer himself, and that if a banker became incidentally aware that a trustee, his customer, meditated a breach of trust, and drew a cheque for that purpose, the banker had no right to refuse payment of the cheque, as this would be making himself party to an inquiry as between his customer and third persons. But that if a trustee being indebted to a banker, applied part of the trust estate in the banker's hands to the payment of the debt, the banker became *particeps criminis*, and was answerable. *Ib.* p. 14. It would seem, therefore, that, in Lord Westbury's opinion, if the trustee did not himself confess the breach of trust, the banker could not refuse payment on evidence *aliunde* that a breach of trust was intended; and see *Barnes v. Addy*, 9 L. R. Ch. App. 244.

[*(u)* *Rodbard v. Cooke*, 25 W. R. 555.]

[*(v)* *Pannell v. Hurley*, 2 Coll. 241; *Bodenham v. Hoskyns*, 2 De G. M. & G. 903; [*Foxton v. Manchester and Liverpool District Banking Company*, 44 L. T. N. S. 406.]

[*(w)* *Newton v. Metropolitan Railway Company*, 1 Dr. & Sm. 583.

¹ Contra, *Luscomb v. Ballard*, 5 Gray, 403.

executor's receipt without notice that the payment is wrongfully made, he thereby obtains a complete discharge (x).]

33. Wherever, as in the several cases mentioned, there is suspicion of fraud, the transaction may be impeached by creditors (y), or specific (z), residuary (a), or even pecuniary legatees (b). But in no case will the Court grant relief where the right of unravelling the transaction has been neglected for a period of twenty years (c).

Who may impeach the sale.
Effect of time.

34. The preceding powers belong to executors and administrators for the purpose of administration of the testator's or intestate's estates. But these powers cannot be assumed to exist where property, though legally vested in an executor or administrator, is not * available for the ordinary purposes of administration. Thus the *executor* or *administrator* of a surviving *trustee* stands on no higher ground than an ordinary trustee, and cannot therefore pass a good title to the purchaser, unless it be warranted by the terms of the trust.

Executor or administrator of a trustee.

SECTION III.

DISABILITY OF TRUSTEES FOR SALE TO BECOME PURCHASERS OF THE TRUST PROPERTY.

WE now come to the subject of *purchases by trustees* of the property vested in them upon trust.¹

Under this head it will be proper to consider, *First*, The extent and operation of the rule, that a trustee shall not purchase the trust estate; *Secondly*, The species of relief to which the *cestui que trust* is enti-

[(x) *Ferrier v. Ferrier*, 11 L. R. Ir. 56; and see *ante*, p. 447.]

(y) *Crane v. Drake*, 2 Vern. 616; *Anon. case*, cited Pr. Ch. 434; and see *Nugent v. Gifford*, 1 Atk. 463; *Mead v. Orrery*, 3 Atk. 238.

(z) *Humble v. Bill*, 2 Vern. 444; *Scott v. Tyler*, 2 Dick. 712.

(a) See *Burting v. Stonard*, 2 P. W. 150; *Mead v. Orrery*, 3 Atk. 235, see 238; *M'Leod v. Drummond*, 17 Ves. 161, 169.

(b) *Hill v. Simpson*, 7 Ves. 152; and see *M'Leod v. Drummond*, 17 Ves. 169.

(c) *Andrew v. Wrigley*, 4 B. C. C. 125; *Bonney v. Ridgard*, 1 Cox, 145; *Mead v. Orrery*, 3 Atk. 235; see 243; and see *M'Leod v. Drummond*, 14 Ves. 353; reversed 17 Ves. 152, see 171.

¹ For the American authorities upon this subject, see Chapter XIII.

tled; *Thirdly*, The time within which the *cestui que trust* must apply to the Court.

First. The extent of the rule.

Trustee for
sale not pur-
chase.

1. A trustee for *sale*, that is, a trustee who is selling, is absolutely and entirely disabled from purchasing the trust property (*d*), whether it be real estate or a chattel personal (*e*), land, or a ground rent (*f*), in reversion or possession (*g*), whether the purchase be made in the trustee's own name or in the name of a trustee for him (*h*), by private contract or public auction (*i*), from himself as the single trustee, or with the sanction of his [** 485*] * co-trustees (*k*); for he who undertakes to act for another in any matter cannot, in the same matter, act for himself (*l*). The situation of the trustee gives him an opportunity of knowing the value of the property, and as he acquires that knowledge at the expense of the *cestui que trust*, he is bound to apply it for the *cestui que trust's* benefit (*m*). Besides, if the trustee appeared at the auction professedly as a bidder, that would operate as a discouragement to others, who seeing the vendor ready to purchase at or above the real value, would feel a reluctance to enter into the competition, and so the sale would be chilled (*n*).

(*d*) *Fox v. Mackreth*, 2 B. C. C. 400; S. C. 2 Cox, 320; affirmed in D. P. 4 B. P. C. 258, &c. That *Fox v. Mackreth* was decided upon this ground, see *Gibson v. Jeyes*, 6 Ves. 277; *Ex parte Lacey*, Id. 627; *Ex parte James*, 8 Ves. 353; *Coles v. Trecothick*, 9 Ves. 247; *Ex parte Bennett*, 10 Ves. 394.

(*e*) *Crowe v. Ballard*, 2 Cox, 253; S. C. 3 B. C. C. 117; *Killick v. Flexney*, 4 B. C. C. 161; *Hall v. Hallet*, 1 Cox, 134; *Whatton v. Toone*, 5 Mad. 54; 6 Mad. 153.

(*f*) *Price v. Byrn*, cited *Campbell v. Walker*, 5 Ves. 681.

(*g*) *Re Bloye's Trust*, 1 Mac. & G. 488, see 492, 495; *Spring v. Pride*, 4 De G. J. & S. 395.

(*h*) *Campbell v. Walker*, 5 Ves. 678; S. C. 13 Ves. 601; *Randall v. Errington*, 10 Ves. 423; *Crowe v. Ballard*, 2 Cox, 253; S. C. 3 B. C. C. 117; *Hall v. Hallet*, 1 Cox, 134; *Watson v. Toone*, 6 Mad. 153; *Baker v. Carter*, 1 Y. & C. 250; *Knight v. Majoribanks*, 2 Mac. & G. 12.

(*i*) *Campbell v. Walker*, *Randall v. Errington*, *ubi supra*; *Ex parte Bennett*, 10 Ves. 381, see 393; *Ex parte James*, 8 Ves. 337, see 349; *Whelpdale v. Cookson*, 1 Ves. 9; S. C. stated from R. L. *Campbell v. Walker*, 5 Ves. 682; *Ex parte Hughes*, 6 Ves. 617; *Ex parte Lacey*, Id. 625; *Lister v. Lister*, Id. 631; *Whichcote v. Lawrence*, 3 Ves. 740; *Attorney-General v. Lord Dudley*, G. Coop. 146; *Downes v. Grazebrook*, 3 Mer. 200.

(*k*) *Whichcote v. Lawrence*, 3 Ves. 740; *Hall v. Noyes*, cited Id. 748; and see *Morse v. Royal*, 12 Ves. 374.

(*l*) *Whichcote v. Lawrence*, 3 Ves. 750; *per Lord Rosslyn*; *Ex parte Lacey*, 6 Ves. 626, *per Lord Eldon*; *Re Bloye's Trust*, 1 Mac. & G. 495.

(*m*) See *Ex parte James*, 8 Ves. 348.

(*n*) See *Ex parte Lacey*, 6 Ves. 629.

But the rule does not apply to a person named as Trustee who trustee, but who has *disclaimed* without having acted has dis-claimed. in the trust (o), [or to a person who has the power of becoming a trustee though he never actually does become one (p),] or to a *tenant for life* whose consent to the sale is required by the terms of the power (q); or to mere nominal trustees as *trustees to preserve contingent remainders* (r); or where A. is the trustee in fee for B. in fee, and A. has *no duty to perform* (s); or where a trustee sells to the trustees of his own settlement and under which he has a partial interest (t).

2. Lord Rosslyn is reported to have considered that Lord to invalidate a purchase by a trustee it was necessary Rosslyn's to show that he had gained an *actual advantage* (u); doctrine. but the doctrine (if any such was ever held by his Lordship (v)) has since been expressly and unequivocally denied (w). The rule is now universal, that, *however fair the transaction*, the *cestui que trust* is at liberty to set aside the sale and take back the property (x). If a trustee were *permitted to [* 486] buy in an *honest* case, he might buy in a case *having that appearance, but which, from the infirmity of human testimony, might be grossly otherwise* (y). Thus a trustee for the sale of an estate may, by the knowledge acquired by him in that character, have discovered a valuable coal mine under it, and, locking that up in his own breast, might enter into a contract for the purchase by himself. In such a case, if the trustee chose

(o) *Stacey v. Elph*, 1 M. & K. 195; and see *Chambers v. Waters*, 3 Sim. 42.

[(p) *Clark v. Clark*, 9 App. Cas. 733.]

(q) *Howard v. Ducane*, T. & R. 81; *Bevan v. Habgood*, 1 J. & H. 222; *Dicconson v. Talbot*, 6 L. R. Ch. App. 32, see *ante*, p. 317.

(r) *Sutton v. Jones*, 15 Ves. 587; *Naylor v. Winch*, 1 S. & S. 567; *Pooley v. Quilter*, 4 Drew. 189; *Parkes v. White*, 11 Ves. 226.

(s) *Pooley v. Quilter*, 4 Drew. 189; and see *Denton v. Donner*, 23 Beav. 289, 290.

(t) *Hickley v. Hickley*, 2 Ch. D. 190.

(u) See *Whichcote v. Lawrence*, 3 Ves. 750.

(v) See *Ex parte Lacey*, 6 Ves. 626; *Lister v. Lister*, Id. 632.

(w) *Ex parte Bennett*, 10 Ves., 385; *Ex parte Lacey*, 6 Ves. 627; *Attorney-General v. Lord Dudley*, G. Coop. 148; *Ex parte James*, 8 Ves. 348; *Mulvany v. Dillon*, 1 B. & B. 409, see 418.

(x) *Ex parte Lacey*, 6 Ves. 625, see 627; *Owen v. Foulkes*, cited, Id. 630, note (b); *Ex parte Bennett*, 10 Ves. 393, *per* Lord Eldon; *Randall v. Errington*, 10 Ves. 423, see 428; *Campbell v. Walker*, 5 Ves. 678, see 680; *Ex parte James*, 8 Ves. 347, 348, *per* Lord Eldon; *Lister v. Lister*, 6 Ves. 631; *Gibson v. Jeyes*, 6 Ves. 277, *per* Lord Eldon; see *Kilbee v. Sneyd*, 2 Moll. 186.

(y) *Ex parte Bennett*, 10 Ves. 385, *per* Lord Eldon.

to deny it, how could the Court establish the fact against the denial? The probability is that a trustee who had once conceived such a purpose would never disclose it, and the *cestui que trust* would be effectually defrauded (z).

Trustee may not buy as agents.

3. As a trustee cannot buy on his own account it follows that he cannot be permitted to buy as *agent* for a third person: the Court can with as little effect examine how far the trustee has made an undue use of information acquired by him in the course of his duty in the one case as in the other (a).

Agent of trustee may not buy.

4. And the rule against purchasing the trust property applies to an *agent* employed by the trustee for the purposes of the sale, as strongly as to the trustee himself (b). And an *agent not for sale, but for management only* (c), and a *receiver* appointed by the Court (d) stand in a confidential relation, and cannot purchase without putting themselves at arm's length, and a full disclosure of their knowledge; [and the partner of a trustee, or any other person through whom the trustee may directly or indirectly derive benefit by reason of the purchase, cannot purchase the trust property from the trustee (e).]

Trustees may not lease to themselves.

5. The *lease* of an estate is in fact the sale of a partial interest in it, and therefore trustees for sale cannot demise to one of themselves, but the lessee, while he shall be held to his bargain if disadvantageous to him, shall be made to account for the profits if it be in his favour (f).

Specific performance.

[* 487] * 6. Where a trustee for sale was the purchaser by an agent at the auction, the *heir* of the trustee had no right to have the contract completed at the

(z) *Ex parte* Lacey, 6 Ves. 627, *per* Lord Eldon; and see *Ex parte* Bennett, 10 Ves. 385, 394, 400; *Ex parte* James, 8 Ves. 348, 349; *Parkes v. White*, 11 Ves. 226; *Campbell v. Walker*, 5 Ves. 681; *Lister v. Lister*, 6 Ves. 632; *Ex parte* Badcock, 1 Mont. & Mac. 239.

(a) *Ex parte* Bennett, 10 Ves. 381, see 400; *Coles v. Trecothick*, 9 Ves. 248, *per* Lord Eldon; and see *Gregory v. Gregory*, G. Coop. 204; [*Mockerjee v. Mockerjee*, 2 L. R. Ind. App. 18.]

(b) *Whitcomb v. Minchin*, 5 Mad. 91; *In re Bloye's Trust*, 1 Mac. & G. 488, see 495; [*Martinson v. Clowes*, 21 Ch. D. 857.]

(c) *King v. Anderson*, 8 I. R. Eq. 147, 625; *Alven v. Bond*, 1 Flan. & Kelly, 196.

(d) *Alven v. Bond*, 1 Flan. & Kelly, 196; *White v. Tommy*, referred to, *Ib.* 224.

[(e) *Ex parte* Moore, 51 L. J. N. S. Ch. 72; 45 L. T. N. S. 558; *Ex parte* Burnell, 7 Jur. 116.]

(f) *Ex parte* Hughes, 6 Ves. 617; *Attorney-General v. Earl of Clarendon*, 17 Ves. 491, see 500.

expense of the *personal* estate, though the *cestui que trust* were willing to acquiesce in the sale (g).

7. When it is said that a trustee for sale may not purchase the trust property, the meaning must be understood to be that the trustee may not purchase from himself, that is, he cannot perform the two functions of seller and buyer; for there is no rule that a trustee, whether for sale or otherwise, may not purchase from his *cestui que trust* (h). Hence, while a purchase by a trustee conducting the sale, either personally or by his agent, cannot stand, a purchase by a trustee from a *cestui que trust* of the interest of the latter in the trust may stand, if the trustee can show that the fullest information and every advantage were given to the *cestui que trust* (i). However, a purchase by a trustee from his *cestui que trust* is at all times a transaction of great nicety, and one which the Courts will watch with the utmost jealousy (k) [and will set aside if the consideration was insufficient (l)]; and the exception runs, it is said, so near the verge of the rule, that it might as well have been included within it (m).

8. Before any dealing with the *cestui que trust*, the relation between the trustee and *cestui que trust* must be actually or virtually dissolved. The trustee may, if he pleases, retire from the office, and qualify himself for becoming a purchaser by divesting himself of that character (n); or if he retain the situation, the parties must be put so much at arm's length, that they agree to stand in the adverse situations of vendor and purchaser (o), the *cestui que trust* distinctly and fully un-

(g) *Ingle v. Richards* (No. 1), 28 Beav. 361.

(h) *Ex parte Lacey*, 6 Ves. 626, per Lord Eldon; *Coles v. Trecothick*, 9 Ves. 244, 246, per eundem; *Gibson v. Jeyes*, 6 Ves. 277, per eundem; *Downes v. Grazebrook*, 3 Mer. 208, per eundem; *Randall v. Errington*, 10 Ves. 426, per Sir W. Grant; *Whicote v. Lawrence*, 3 Ves. 750, per Lord Rosslyn; *Sanderson v. Walker*, 13 Ves. 601, per Lord Eldon; *Ayliffe v. Murray*, 2 Atk. 59, per Lord Hardwicke; *Kilbee v. Sneyd*, 2 Moll. 214, per Sir A. Hart.

(i) *Denton v. Donner*, 23 Beav. 285; *Luff v. Lord*, 34 Beav. 220.

(k) *Coles v. Trecothick*, 9 Ves. 244, per Lord Eldon; *Ex parte Lacey*, 6 Ves. 626, per eundem; *Downes v. Grazebrook*, 3 Mer. 209, per eundem; *Plowright v. Lambert*, 52 L. T. N. S. 646.

(l) *Mockerjee v. Mockerjee*, 2 L. R. Ind. App. 18; *Plowright v. Lambert*, 52 L. T. N. S. 646.]

(m) *Morse v. Royal*, 12 Ves. 372, per Lord Erskine.

(n) *Downes v. Grazebrook*, 3 Mer. 208, per Lord Eldon.

(o) *Gibson v. Jeyes*, 6 Ves. 277, per Lord Eldon; and see *Ex parte Lacey*, 6 Ves. 626, 627; *Ex parte Bennett*, 10 Ves. 394; *Morse v. Royal*, 12 Ves. 373; *Sanderson v. Walker*, 13 Ves. 601; [*Re Worssam*, 46 L. T. N. S. 584.]

derstanding that he is selling to the trustee, and consenting to waive all objections upon that ground (*p*), [*488] * and the trustee fairly and honestly disclosing all the necessary particulars of the estate, and not attempting a furtive advantage to himself by means of any private information (*q*). The trustee will not be allowed to go on acquainting himself with the nature of the property up to the moment of sale, and then casting aside his character of trustee, turn his experience to his own account (*r*).

Instances where trustee has been allowed to purchase.

9. In what cases a trustee will be at liberty to become a purchaser, may be best illustrated by a few instances.

Where the *cestui que trust* took the whole management of the sale himself, chose, or at least approved, the auctioneer, made surveys, settled the plan of sale, fixed the price, and so had a perfect knowledge of the value of the property, and then by his agent, but with his own personal consent, agreed to sell a lot which had been bought in to one of the trustees for sale acting as agent for another, Lord Eldon said, that if in any instance the rule was to be relaxed by consent of the parties, this was the case, and decreed the agreement to be specifically performed (*s*).

Again, a *cestui que trust* had strongly urged the purchase upon one of his trustees, who at first expressed an unwillingness, but afterwards, upon being pressed, agreed to the terms; and the sale was supported (*t*).

So, where a trustee for sale had endeavoured in vain to dispose of the estate, and then purchased himself of the *cestui que trust*, at a fair and adequate price, and there was no imputation of fraud or concealment, Lord Northington said, "He did not like the circumstance of a trustee dealing with his *cestui que trust*, but upon the whole, he did not see any principle upon which he could set the transaction aside" (*u*).

Solicitor of the *cestui que trust*.

10. It has been pronounced too dangerous to allow the *cestui que trust's* solicitor, without a *special author-*

(*p*) See *Randall v. Errington*, 10 Ves. 427.

(*q*) *Coles v. Trecothick*, 9 Ves. 247, per Lord Eldon; *Morse v. Royal*, 12 Ves. 373, 377, per Lord Erskine; *Gibson v. Jeyes*, 6 Ves. 277, per Lord Eldon; *Randall v. Errington*, 10 Ves. 427, per Sir W. Grant; [*Re Worssam*, 46 L. T. N. S. 584.]

(*r*) See *Ex parte James*, 8 Ves. 352; *Spring v. Pride*, 4 De G. J. & S. 395.

(*s*) *Coles v. Trecothick*, 9 Ves. 234.

(*t*) *Morse v. Royal*, 12 Ves. 355.

(*u*) *Clarke v. Swaile*, 2 Eden, 134.

ity, to bind his employer by such a contract with the trustee (v).

11. Where the *cestuis que trust* are creditors, it has been held that the trustee cannot purchase with the sanction of the major part of them, but that the liberty must be given by the unanimous voice of the whole body (w). However, the Court has sanctioned * purchases of a bankrupt's estate by *assignees*, [* 489] where the assent of a general meeting of creditors had been obtained (x); and the Court would, no doubt, in executing the trust of a creditor's deed, allow a trustee to purchase, if it were really for the benefit of the creditors.

12. The Court has no jurisdiction on behalf of the *cestuis que trust* who are *sui juris* to authorize a trustee to bid, for that is a question the *cestuis que trust* are entitled to decide for themselves (y). So far as the Court is concerned, it will not give a trustee leave to bid, for it is his duty to communicate all the information he can for the benefit of the sale, and this he might not be disposed to do if he were allowed to purchase himself (z). But if a sale by auction under the direction of the Court has been tried in vain, the trustee is at liberty to make proposals on his own behalf, and the Court may be induced to accept the offer (a).

[13. Where, in an administration action, leave was given to the solicitor for the defendant (the executor) to bid at the sale, which was to be conducted by the plaintiffs' solicitors, independently of the executor, it was held that the effect of the leave was to put an end to the fiduciary relation in which he formerly stood, and to place him in the position of a mere stranger, and that he was under no obligation to disclose to the Court any facts within his knowledge affecting the value of the property (b). But if the intending purchaser lays any information before the Court for the purpose of obtaining its approval of the sale, he is bound to disclose all the material facts within his knowledge; and L.J.]

(v) *Downes v. Grazebrook*, 3 Mer. 209, *per* Lord Eldon.

(w) Sir G. Colebrooke's case, cited *Ex parte Hughes*, 6 Ves. 622; *Ex parte Lacey*, Id. 628; the cases cited Id. 630, note (b). *Whelpdale v. Cookson* (cited *Campbell v. Walker*, 5 Ves. 682), was doubted by Lord Eldon, 6 Ves. 628.

(x) *Anon.* case, 2 Russ. 350; *Ex parte Bage*, 4 Mad. 459.

(y) See *Ex parte James*, 8 Ves. 352.

(z) *Tennant v. Trenchard*, 4 L. R. Ch. App. 545

(a) S. C. 4 L. R. Ch. App. 547.

[(b) *Boswell v. Coaks*, 23 Ch. D. 302; reversed on other grounds, 27 Ch. D. 424.]

Baggallay, in delivering the judgment of the Court of Appeal in *Boswell v. Coaks*, observed :—" The Court is neither buyer nor seller, and it is the duty of everyone laying materials before it for the purpose of obtaining its approval of any transaction to take care that the materials furnished to guide the Court shall not be incomplete or misleading. If the approval of the Court has been obtained by misrepresentation, or by the withholding of material information, through the absence of which the information furnished is misleading, the Court will treat such misrepresentation or withholding as fraud, and will act accordingly " (c).]

Where *cestuis que trust* are infants.

14. If the *cestuis que trust* be under disability, as infants, the trustee, as he cannot be released from the liabilities of his situation, * cannot by any act *in pais* become the purchaser of the estate (d); but, if it be absolutely necessary that the property should be sold, and the trustee is ready to give more than any one else, he may institute proceedings in equity, and apply by motion, [or summons] to be allowed to purchase, and the Court will then examine into the circumstances, ask who had the conduct of the transaction, whether there is reason to suppose the premises could be sold better, and upon the result of that inquiry will let another person prepare the particular of sale, and allow the trustee to bid (e); and, generally, if the Court can see clearly that under the circumstances of the case it would be for the benefit of the *cestuis que trust* that the trustee should purchase (as at a certain sum beyond what could be obtained elsewhere), the Court would sanction a sale to the trustee (f).

Of executors, administrators, assignees, &c.

15. The principles laid down with reference to *trustees for sale* are of course applicable to all who, though differing in name, are invested with the *like fiduciary character*, as executors and administrators (g), an executor in his own wrong (h), trustees for creditors (i),

[(c) 27 Ch. D. 454.]

(d) *Campbell v. Walker*, 5 Ves. 678; S. C. 13 Ves. 601.

(e) *Campbell v. Walker*, 5 Ves. 681, 682, *per* Lord Alvanley.

(f) *Farmer v. Dean*, 32 Beav. 327.

(g) *Hall v. Hallett*, 1 Cox, 134; *Killick v. Flexney*, 4 B. C. C. 161; *Watson v. Toone*, 6 Mad. 153; *Kilbee v. Sneyd*, 2 Moll. 186; *Baker v. Carter*, 1 Y. & C. 250; and see *Naylor v. Winch*, 1 S. & S. 566.

(h) *Mulvany v. Dillon*, 1 B. & B. 408.

(i) *Ex parte Hughes*, 6 Ves. 617; *Ex parte Lacey*, Id. 625, and the cases cited Id. 630, note (b); *Ex parte Bennett*, 10 Ves. 395, *per* Lord Eldon; *Ex parte Reynolds*, 5 Ves. 707; *Ex parte James*, 8 Ves. 346, *per* Lord Eldon; *Ex parte Morgan*, 12 Ves. 6; *Ex parte Bage*, 4 Mad. 459; *Ex parte Badcock*, 1 Mont. & Mac. 231; *Pooley v. Quilter*, 2 De G. & J. 327.

an agent (*k*), &c.; but a mortgagee may purchase from his mortgagor (*l*), surviving partners may purchase from the representatives of a deceased partner (*m*), [the trustee in the joint bankruptcy of surviving partners, who have a large claim against the estate of the deceased partner, may purchase from the representatives of the deceased partner (*n*),] and the creditor taking out execution is not precluded from becoming the purchaser of the property upon a sale by the sheriff (*o*); [and a person named as executor, but who, in fact, never proves the will, is not excluded from purchasing from the executor who proves (*p*).]

Secondly. As to the terms upon which the sale will be set aside.

* 1. The *cestui que trust*, if he chooses it, [* 491] *Cestui que trust may have the specific estate reconveyed to him by the trustee (q), or, where the trustee has sold it with notice, by the party who purchased (r), the cestui que trust on the one hand repaying the price at which the trustee bought, with interest at 4 per cent. (s), and the trustee or purchaser on the other accounting for the profits of the estate (t), but not with interest (u), and if he was in actual possession, being charged with an occupation rent (v). [But if the consideration passing from the trustee is not wholly pecuniary, and the cestui que trust has by subsequent dealings put it out of his power to restore to the trustee the benefits de-* *trust may recover the specific estate.*

(*k*) *King v. Anderson*, 8 I. R. Eq. 147, reversed *Ib.* 625; *Murphy v. O'Shea*, 2 Jon. & Lat. 422.

(*l*) *Knight v. Majoribanks*, 11 Beav. 322; 2 Mac. & G. 10.

(*m*) *Chambers v. Howell*, 11 Beav. 6. As to purchases by one partner under an execution against another partner, see *Perens v. Johnson*, 3 Sm. & G. 419.

[(*n*) *Boswell v. Coaks*, 23 Ch. D. 302; reversed on other grounds, 27 Ch. D. 424.]

(*o*) *Stratford v. Twynam*, Jac. 418.

[(*p*) *Clark v. Clark*, 9 App. Cas. 733.]

(*q*) See *Ex parte James*, 8 Ves. 351; *Ex parte Bennett*, 10 Ves. 400; *Lord Hardwicke v. Vernon*, 4 Ves. 411; *York Buildings' Company v. Mackenzie*, 8 B. P. C. 42.

(*r*) *Attorney-General v. Lord Dudley*, G. Coop. 146; *Dunbar v. Tredennick*, 2 B. & B. 304.

(*s*) *Watson v. Toone*, 6 Mad. 153; *Ex parte James*, 8 Ves. 351. *per Lord Eldon*; *Whelpdale v. Cookson*, stated from *R. L. Campbell v. Walker*, 5 Ves. 682; *Hall v. Hallett*, 1 Cox, 134, see 139; *York Buildings' Company v. Mackenzie, ubi supra, &c.*

(*t*) *Ex parte James*, 8 Ves. 351, *per Lord Eldon*; *Ex parte Lacey*, 6 Ves. 630, *per eundem*; *Watson v. Toone*, Mad. 153; *Whelpdale v. Cookson*, *York Buildings Company v. Mackenzie, ubi supra.*

(*u*) *Macartney v. Blackwood*, 1 Ridg. Knapp. & Sch. 602.

(*v*) *Ex parte James*, 8 Ves. 351, *per Lord Eldon.*

rived from him, he has lost his right to set aside the transaction (*w*).]

Allowances
for repairs.

2. The trustee will have all just allowances made to him for *improvements and repairs* which are substantial and lasting (*x*), or such as have a tendency to bring the estate to a better sale (*y*), as in one case for a mansion house erected, plantations of shrubs, &c. (*z*); and in estimating the improvements, the buildings pulled down, if they were incapable of repair, will be valued as old materials; but otherwise they will be valued as buildings standing (*a*). Should the property have been *deteriorated* by the acts of the trustee, his purchase-money will suffer a proportionate reduction (*b*). [And if the subject matter of the sale be a business sold as a going concern, and the purchasing trustee carry it on under his own personal direction, on the sale being set aside he will be allowed to deduct from the profits all outgoings for wages of assistants, expenditure for stock, &c., but will not be allowed any salary for his own management of the business (*c*).]

Case of
actual fraud.

[*492] *3. Where the contract is vitiated by the presence of *actual fraud*, allowance will still be made to the trustee for necessary repairs (*d*), and in one case allowance was also made for improvements (*e*); but in another case of actual fraud the Court refused any allowance for improvements. "If," said Lord Fitzgibbon, "a man has acquired an estate by rank and abominable fraud, and shall afterwards expend his money in improving the estate, is he therefore to retain it in his hands against the lawful proprietor? If such a rule should prevail, it would justify a proposition I once heard at the bar, that the common equity of the country was to *improve the right owner out of the possession of his estate*" (*f*).

4. A trustee, the sale having taken place during the

[(*w*) *Re Worssam*, 46 L. T. N. S. 584; *Dimsdale v. Dimsdale*, 3 Dr. 556, 577.]

(*x*) *Ex parte Hughes*, 6 Ves. 624, 625; *Ex parte James*, 8 Ves. 352; *Campbell v. Walker*, 5 Ves. 682; *Davey v. Durrant*, 1 De G. & J. 535; *King v. Anderson*, 8 I. R. Eq. 625, see 636.

(*y*) *Ex parte Bennett*, 10 Ves. 400.

(*z*) *York Buildings' Company v. Mackenzie*, 8 B. P. C. 42.

(*a*) *Robinson v. Ridley*, 6 Mad. 2.

(*b*) *Ex parte Bennett*, 10 Ves. 401.

[(*c*) *Re Norrington*, 13 Ch. D. 654.]

(*d*) *Baugh v. Price*, 1 G. Wils. 320.

(*e*) *Oliver v. Court*, 8 Price, 172.

(*f*) *Kenney v. Browne*, 3 Ridg. 518; and see *Stratton v. Murphy*, 1 Ir. Rep. Eq. 361.

pendency of a suit, had paid part of his purchase-money into Court, which had been *invested in the funds*. On the purchase being set aside, the trustee claimed the benefit of the rise of the stock, but it was held that he was entitled only to his purchase-money with interest, for had there occurred a fall of the stock, he could not have been compelled to submit to the loss (*g*).

Trustee paying purchase-money into Court.

5. If the trustee is to be discharged from the situation of purchaser, he is to be discharged at once, and the Court will order an immediate re-conveyance upon immediate re-payment of the money (*h*).

Trustee to be discharged from the sale immediately.

6. The reconveyance of the estate will be without prejudice to the titles and interests of *lessees* and others who have contracted with the trustee *bonâ fide* before the pendency of the suit (*i*).

Lessees not prejudiced.

7. But the *cestui que trust*, particularly where the assignee in bankruptcy has become the purchaser, may claim, not a re-conveyance of the specific estate, but a re-sale of the property under the direction of the Court. The terms of the re-sale have not always been uniform. In *Whelpdale v. Cookson* (*k*), Lord Hardwicke said the majority of the creditors should elect whether the purchase should stand; so that should they elect to re-sell, and the estate should be sold at still lower price, the creditors would suffer. The doctrine of Lord Thurlow appears to have been, that the property should be put up at the price at which the trustee purchased, and if any advance was made, the sale should take effect, * but if no bidding, the trustee should be held [* 493] to his bargain (*l*). Lord Alvanley followed the authority of Lord Hardwicke, and directed an inquiry whether it was for the benefit of the infants that the premises should be re-sold, and if for their benefit, that the sale should be made (*m*). "To this principle," said Lord Eldon, "the objection is that a great temptation to purchase is offered to trustees, the question whether the re-sale would be advantageous at the *cestui que trust* being of necessity determined at the hazard of a wrong determination" (*n*). Lord Eldon therefore conceived it best to adopt the rule of Lord Thurlow, and so

Of submitting the estate to a re-sale.

(*g*) *Ex parte James*, 8 Ves. 337, see 351.

(*h*) See *Ex parte Bennett*, 10 Ves. 400, 401.

(*i*) *York Buildings' Company v. Mackenzie*, 8 B. P. C. 42; see the decree.

(*k*) Cited *Campbell v. Walker*, 5 Ves. 682.

(*l*) See *Lister v. Lister*, 6 Ves. 633; *Ex parte James*, 8 Ves. 351.

(*m*) *Campbell v. Walker*, 5 Ves. 678, see 682.

(*n*) *Sanderson v. Walker*, 13 Ves. 603.

he decreed in *Ex parte Hughes* (o), and *Ex parte Lacey* (p). Sir W. Grant, in a subsequent case (q), said he was not aware that Lord Eldon had laid down any general rule as to the terms; but a few days after, having consulted the Lord Chancellor upon the subject, and discovering his mistake, he framed his decree in conformity with the Lord Chancellor's decisions. The same principle has since been followed in numerous other cases (r), and the practice may be considered as settled.

Allowance
for repairs,
&c.

8. Should the trustee have *repaired or improved* the estate, the expense of the repairs and improvements, if allowed, will be added to the purchase-money, and the estate be put up at the accumulated sum (s).

Re-selling in
lots.

9. Where the trustee has purchased in one lot, the *cestuis que trust* cannot insist on a re-sale in different lots. If desirous of reselling the property in that mode, they must pay the trustee his principal and interest, and then, as the absolute owners, they may sell as they please (t).

Difficulty of
Lord Hard-
wicke's rule.

10. In the application of Lord Hardwicke's rule it was a question constantly occurring, whether the body of creditors at large could be bound by the resolution of the majority to insist upon a re-sale; but by the practice of Lord Eldon, the difficulty on that head is avoided (u), for as the creditors cannot by possibility sustain an injury, it is competent to any individual creditor to try the experiment (v).

The remedy
against
trustee who
has sold the
property.

[* 494] * 11. If before the *cestui que trust* commences proceedings for relief the trustee has passed the estate into the hands of a purchaser *without notice*, the *cestui que trust* may compel the trustee to account for the difference of *price* (w), or for the difference between the sum the trustee paid and the real *value* of the estate at the time of the purchase (x), with interest at 4 per cent (y).

(o) 6 Ves. 617.

(p) Id. 625; and see *Ex parte Reynolds*, 5 Ves. 707.

(q) *Lister v. Lister*, 6 Ves. 633.

(r) *Ex parte James*, 8 Ves. 337; *Ex parte Bennett*, 10 Ves. 381; *Robinson v. Ridley*, 6 Mad. 2.

(s) *Ex parte Bennett*, 10 Ves. 400; *Ex parte Hughes*, 6 Ves. 625; *Robinson v. Ridley*, 6 Mad. 2.

(t) See *Ex parte James*, 8 Ves. 351, 352.

(u) *Ex parte Hughes*, 6 Ves. 624.

(v) *Ex parte James*, 8 Ves. 353; and see *Ex parte Lacey*, 6 Ves. 628.

(w) *Fox v. Mackreth*, 2 B. C. C. 400; S. C. 2 Cox. 320; *Hall v. Hallet*, 1 Cox, 134; *Whicote v. Lawrence*, 3 Ves. 740; *Ex parte Reynolds*, 5 Ves. 707; *Randall v. Errington*, 10 Ves. 423.

(x) See *Lord Hardwicke v. Vernon*, 4 Ves. 411.

(y) *Hall v. Hallet*, 1 Cox, 134, see 139.

12. An administrator had become the purchaser of some shares in Scotch mines, part of the assets, and afterwards sold them to a stranger at a considerable advance of price, and Lord Thurlow decreed the trustee to account for every advantage he had made, but said he could not go the length of ordering the defendant to replace the shares. He conceived the plaintiff, one of the next kin, had no such *election* of choosing between the *specific thing* and the *advantage* made of it (z).

13. The *costs of the suit* will, as a general rule, follow the decree—that is, if the trustee be compelled to give up his purchase, unless his conduct was perfectly honourable and the sale is set aside on the mere dry rule of equity (a), he must pay the expenses he has himself occasioned (b); and if the charge be unfounded, the costs must be paid by the plaintiff. But if there be great delay on the part of the *cestui que trust*, the costs will be refused him, though he succeed in the suit (c); and, on the other hand, if the suit be dismissed, not because the transaction was not originally impeachable, but merely on account of the great interval of time, the Court may refuse to order the plaintiff to pay the costs of the defendant (d).

14. If the *trustee devise the estate* purchased by him, and the purchase is set aside as against the devisee, it is conceived that as the devise carried all the testator's interest in the property the monies repaid will belong to the devisee. But if the *trustee die intestate*, then whether monies repaid shall belong to the next of kin or the heir of the trustee is a question of great difficulty. In favour of the former it may be urged, that as there is no equity between the heir-at-law and next of kin, the monies repaid being in fact personal estate must belong to the next of kin: that the Court rescinds the transaction by taking an account of rents and *allowing 4 per cent. interest on [* 495] the purchase-money from the time of the purchase, and that the rents and interest accrued during the life of the intestate must certainly be regarded as personal estate, and that the right of the next of kin is supported

(z) S. C.

(a) *Baker v. Carter*, 1 Y. & C. 250.

(b) *Whichcote v. Lawrence*, 3 Ves. 752; *Hall v. Hallet*, 1 Cox, 141; *Sanderson v. Walker*, 13 Ves. 601, 604; *Crowe v. Ballard*, 2 Cox, 253; S. C. 3 B. C. C. 117; *Dunbar v. Tredennick*, 2 B. & B. 304; *Smedley v. Varley*, 23 Beav. 358.

(c) *Attorney-General v. Lord Dudley*, G. Coop. 146.

(d) *Gregory v. Gregory*, G. Coop. 201.

by *Lawes v. Bennett* (e), and other cases, where a lessee has an option of purchasing and the option is exercised after death of the lessor, in which case there is a retrospective conversion. On the other hand, it may be argued that a purchase by a trustee is not void but voidable only, and that the heir is clearly not bound to account for the rents while he was in possession, and that the Court takes an account of rent and interest *ab initio*, not for the purpose of increasing the trustee's personal estate, but for measuring the price which the *cestui que trust* must pay for recovering the estate: that the heir takes all the title which the intestate could give him, subject to an equity subsisting in another to wrest the estate from him upon certain terms, and that the monies repaid are in fact the estate, after satisfying the outstanding claims: that the cases decided upon contract have no application, as the monies are here repaid contrary to the contract: that a different doctrine would lead to great inconvenience in adjusting the accounts of rent and interest, and also from intermediate settlements or other dispositions by the heir; it would be very hard, for instance, that purchasers under a marriage settlement, with constructive notice, should, because they cannot have the whole benefit, be deprived of every benefit. The inclination of the author's opinion is in favour of the real representative, but the point remains to be decided.

Thirdly. As to the time within which the sale may be set aside.

Cestui que trust must set aside the sale in reasonable time.

1. If the *cestui que trust* desire to set aside the purchase, he must make his application to the Court in *reasonable time*, or he will not be entitled to relief (f). A long acquiescence under a sale to a trustee is treated as evidence that the relation between the trustee and *cestui que trust* had been previously abandoned, and that in all other respects the purchase was fairly conducted (g).

What considered a reasonable time.

2. A sale cannot, in general, be set aside after a lapse of twenty years (h); but in these cases the Court does not confine itself to that period by analogy to the

(e) 1 Cox, 167.

(f) *Campbell v. Walker*, 5 Ves. 680, 682, *per* Lord Alvanley; *Chalmer v. Bradley*, 1 J. & W. 59, *per* Sir T. Plumer; *Ex parte James*, 8 Ves. 351, *per* Lord Eldon; *Webb v. Rorke*, 2 Sch. & Lef. 672, *per* Lord Redesdale; *Randall v. Errington*, 10 Ves. 427, *per* Sir W. Grant. But see *Baker v. Peck*, 9 W. R. 186.

(g) *Parkes v. White*, 11 Ves. 226, *per* Lord Eldon; and see *Morse v. Royal*, 12 Ves. 374, 378.

(h) *Price v. Byrn*, cited *Campbell v. Walker*, 5 Ves. 681; *Barwell v. Barwell*, 34 Beav. 371.

Statute of Limitations¹, for relief * has been [* 496] refused after an acquiescence of eighteen years (*i*); and seventeen years (*k*); and it is presumed that even a shorter period would be a bar to the remedy, where the *cestui que trust* could offer no excuse for his *laches* (*l*). However, the sale has been opened after an interval of ten years (*m*), and eleven years (*n*); and even after a much greater lapse of time where the executor had purchased in the names of trustees for himself, and the transaction was attended with circumstances of disguise and concealment (*o*).

3. Persons not *sui juris*, as *femes covert* and infants, Of persons cannot be precluded from relief on the ground of ac- under dis- quiescence during the continuance of the disability (*p*). ability. But *femes covert* as to property settled to their *separate use*, [or belonging to them as their separate property under the Married Women's Property Act, 1882 (*q*),] if their power of anticipation be not restricted, are regarded as *femes sole* (*r*).

4. A class of persons, as *creditors*, cannot be expected Time in the prosecution of their common interest to exert the allowed to a same vigour and activity as *individuals* would do in the class of pursuit of their exclusive rights (*s*). Accordingly cred- persons. itors have succeeded in their suit after a *laches* of twelve years (*t*); but even creditors will be barred of their remedy if they be chargeable with very gross *laches*, as with acquiescence in the sale for a period of thirty-three years (*u*).

5. For *laches* to operate as a bar, it must be shown Time no bar that the *cestui que trust* knew the trustee was the pur- where cir- where cir- cumstances cumstances not known.

(*i*) *Gregory v. Gregory*, G. Coop. 201, affirmed on appeal, see Jac. 631; *Champion v. Rigby*, 1 R. & M. 539; *Roberts v. Tunstall*, 4 Hare, 257; *King v. Anderson*, 8 I. R. Eq. 625.

(*k*) *Baker v. Read*, 18 Beav. 398.

(*l*) See *Oliver v. Court*, 8 Price, 167, 168.

(*m*) *Hall v. Noyes*, cited *Whitchcote v. Lawrence*, 3 Ves. 748; [and see *Re Worssam*, 46 L. T. N. S. 584.]

(*n*) *Murphy v. O'Shea*, 2 Jon. & Lat. 422.

(*o*) *Watson v. Toone*, 6 Mad. 153.

(*p*) *Campbell v. Walker*, 5 Ves. 678; S. C. 13 Ves. 601; *Roche v. O'Brien*, 1 B. & B. 330, see 339.

[(*q*) 45 & 46 Vict. c. 75.]

(*r*) See *infra*.

(*s*) *Whitchcote v. Lawrence*, 4 Ves. 740, see 752; *Ex parte Smith*, 1 D. & C. 267; *Hardwick v. Mynd*, 1 Anst. 109; [*Boswell v. Coaks*, 27 Ch. D. 424]; and see *Kidney v. Coussmaker*, 12 Ves. 158; *York Building's Company v. Mackenzie*, 8 B. P. C. 42; *Ex parte Smith* 1 D. & C. 267.

(*t*) *Anon. case* in the Exchequer, cited *Lister v. Lister*, 6 Ves. 632.

(*u*) See *Hercy v. Dinwoody*, 2 Ves. jun. 87; *Scott v. Nesbitt*, 14 Ves. 446.

chaser; for while the *cestui que trust* continues ignorant of that fact, he cannot be blamed for not having quarrelled with the sale (*v*).

Distress of
cestui que
trust.

6. The effect of the length of time may also be materially influenced by the continued *distress* of the *cestui* [* 497] *que trust* (*w*), but * poverty is merely an ingredient in the case, and will not alone displace the bar (*x*).

Confirmation
of the sale.

7. Of course the *cestui que trust* may ratify the sale to the trustee by an express and actual *confirmation* (*y*); and if the *cestui que trust* choose to confirm it, he cannot afterwards annul his own act on the ground of no adequate consideration (*z*). But—

Requisites of
good confir-
mation.

a. The confirming party must be *sui juris*—not labouring under any disability, as infancy or coverture (*a*). But, in the case of real estate a *feme covert* can, if it be not settled to her separate use without anticipation, confirm the purchase under the operation of the Fines and Recoveries Act (*b*). And in confirmation, as in acquiescence, a *feme covert* who has property, whether real or personal, settled to her separate use, [or belonging to her as her separate property under the recent Act (*c*),] (provided her power of anticipation be not restrained), has, to the extent of her interest in the property, all the capacity of a *feme sole* (*d*).

β. The confirmation must be a solemn and deliberate act, not, for instance, fished out from loose expressions in a letter (*e*); and particularly where the original transaction was infected with fraud, the confirmation of it is so inconsistent with justice, and so likely to be accompanied with imposition, that the Court will watch it with the utmost strictness, and not allow it to stand but on the very clearest evidence (*f*).

γ. There must be no *suppressio veri* or *suggestio falsi*,

(*v*) *Randall v. Errington*, 10 Ves. 423, see 427; *Chalmer v. Bradley*, 1 J. & W. 51.

(*w*) *Oliver v. Court*, 8 Price, 127; see 167, 168; and see *Gregory v. Gregory*, G. Coop. 201; *Roche v. O'Brien*, 1 B. & B. 342.

(*x*) *Roberts v. Tunstall*, 4 Hare, 257; see p. 267.

(*y*) *Morse v. Royal*, 12 Ves. 355; *Clarke v. Swaile*, 2 Eden, 134; and see *Chesterfield v. Janssen*, 2 Ves. 125; S. C. 1 Atk. 301.

(*z*) *Roche v. O'Brien*, 1 B. & B. 353, *per* Lord Manners.

(*a*) *Campbell v. Walker*, 5 Ves. 678; S. C. 13 Ves. 601; *Roche v. O'Brien*, 1 B. & B. 330, see 339; and see *Scott v. Davis*, 4 M. & Cr. 92.

(*b*) 3 & 4 W. 4, c. 74; and see 8 & 9 Vict. c. 106.

[(*c*) 45 & 46 Vict. c. 75.]

(*d*) See *infra*.

(*e*) *Carpenter v. Heriot*, 1 Eden, 338; and see *Montmorency v. Devereux*, 7 Cl. & Fin. 188.

(*f*) *Morse v. Royal*, 12 Ves. 373, *per* Lord Erskine.

but the *cestui que trust* must be honestly made acquainted with all the material circumstances of the case (g).

δ. It has been laid down that the confirming party must not be ignorant of the *law*, that is, he must be aware that the transaction is of such a character that he could impeach it in a Court of Equity (h); but it may be doubted whether this view is consistent * with [498] the established doctrine, that mistake of *law* as distinguished from mistake of *fact* forms no ground for relief (i).

ε. The confirmation must be wholly distinct from and independent of the original contract (k)—not a conveyance of the estate executed in pursuance of a covenant in the original deed for further assurance (l).

ς. The confirmation must not be wrung from the *cestui que trust* by distress or terror (m).

ζ. Where the *cestui que trust* are a class of persons, as creditors, the sanction of the major part will not be obligatory on the rest, but the confirmation to be complete, must be the joint act of the whole body (n).

(g) See *Murray v. Palmer*, 2 Sch. & Lef. 486; *Baugh v. Price*, 1 G. Wils. 320; *Morse v. Royal*, 12 Ves. 373; *Cole v. Gibson*, 1 Ves. 507; *Roche v. O'Brien*, 1 B. & B. 338, and following pages; *Adams v. Clifton*, 1 Russ 297; *Cockerell v. Cholmeley*, 1 R. & M. 425; *S. C. Taml.* 444; *Chesterfield v. Janssen*, 2 Ves. 146, 149, 152, 158; *Chalmer v. Bradley*, 1 J. & W. 51.

(h) See *Cann v. Cann*, 1 P. W. 727; *Dunbar v. Tredennick*, 2 B. & B. 317; *Burney v. Macdonald*, 15 Sim. 15; *Molony v. L'Estrange*, 1 Beat. 413; *Crowe v. Ballard*, 2 Cox, 357; *S. C.* 1 Ves. jun. 220; *S. C.* 3 B. C. C. 120; *Watts v. Hyde*, 2 Coll. 377; *Cockerell v. Cholmeley*, 1 R. & M. 425; *Murray v. Palmer*, 2 Sch. & Lef. 486; *Roche v. O'Brien*, 1 B. & B. 339; *Ex parte James*, 9 L. R. Ch. App. 609.

(i) *Midland Great Western Railway of Ireland Company v. Johnson*, 6 H. L. Cas. 798; and see *Stafford v. Stafford*, 1 De G. & J. 202; *Stone v. Godfrey*, 5 De G. M. & G. 76; *Re Saxon Life Assurance Company*, 2 J. & H. 412.

(k) See *Wood v. Downes*, 18 Ves. 128; *Morse v. Royal*, 12 Ves. 373; *Scott v. Davis*, 4 M. & Cr. 91, 92; *Roberts v. Tunstall*, 4 Hare, 267.

(l) *Roche v. O'Brien*, 1 B. & B. 330, see 338; *Wood v. Downes*, 18 Ves. 120, see 123; and see *Fox v. Mackreth*, 2 B. C. C. 400.

(m) See *Roche v. O'Brien*, 1 B. & B. 330, *Dunbar v. Tredennick*, 2 B. & B. 317; *Crowe v. Ballard*, 2 Cox, 257.

(n) *Sir G. Colebrooke's case*, cited *Ex parte Hughes*, 6 Ves. 622; *Ex parte Lacey*, Id. 628; the cases cited, Id. 630, note (b). *Whelpdale v. Cookson*, cited *Campbell v. Walker*, 5 Ves. 682, has been doubted by Lord Eldon, 6 Ves. 628.

DUTIES OF TRUSTEES FOR PURCHASE.

A TRUST for *purchase* is not so frequent as a trust for *sale*, and yet occurs often enough to merit a separate consideration.

Trustees
liable for con-
sequences of
breach of
duty.

1. The general rule is that trustees for purchase, like all other trustees, are bound to discharge the duty prescribed, and failing to do so are answerable for the consequences; as, if a specific fund be bequeathed to trustees upon trust to lay out on a purchase, and they neglect to call in the fund and lay it out, they are liable to compensate the *cestuis que trust* for the consequences (o).

May enter
into a
previous con-
tract.

2. It is almost unnecessary to premise, that trustees for purchase are not confined to the mere act of *paying* the purchase-money and taking a *conveyance*, but may in the ordinary course of business, enter into a previous written *contract* as a preliminary to the purchase.

Must see to
value.

3. A material point to which trustees of this kind have to advert is the intrinsic *value* of the estate proposed to be bought, and, to arrive at a sound conclusion on this head, they must employ a valuer of their own (p), and must not rely upon any valuation made on behalf of the vendor; "nothing," said Lord Romilly, "is more uncertain than a valuation, and the Court has constantly to observe upon the great discrepancy between valuations made by those persons who want to enhance, and by those persons who want to depreciate the value of the property. A man *bonâ fide* forms his opinion, but he looks at the case in a totally different way, when he knows on whose behalf he is acting;" and in reference to the case of a loan by trustees on mortgage (but which is not on principle distinguishable from a sale) he added, a trustee cannot with propriety lend trust money on mortgage upon a valuation made by or on behalf of the mortgagor. If he does so, and the valuer

(o) *Craven v. Craddock*, W. N. 1868, p. 229.

[(p) In *Fry v. Tapson*, 28 Ch. D. 268; it was held that the appointment of the valuer could not be left to the trustees' solicitor, but that the trustees were bound to exercise their own judgment as to the selection of a valuer.]

has *bonâ fide* valued the property at double its value, the trustee must take * the consequences; he [* 500] ought to have employed a valuer on his own behalf to see to it" (q).

4. Another question of importance is that of *title*. There must be a good title. Every direction or authority to lay out trust money upon a purchase of real estate, carries with it the tacit condition that there shall be a good title. Whether, therefore, the trustees are proposing to purchase by *private contract* or by *auction*, they must take care not to bind themselves by any agreement which shall preclude them from requiring a good marketable title. If the intended contract or conditions of sale contain anything of a special character, the trustees should lay them before their counsel for his opinion, whether the stipulations are consistent with their trust (r). Formerly a good marketable title was one traced back for a period of sixty years, but by 36 & 38 Vict. c. 78, s. 1, a forty years' title has now been substituted.

[5. The 2nd section of the same Act as to contracts for sale made after the 31st December, 1874, and the 3rd section of The Conveyancing and Law of Property Act, 1881 (s) as to contracts for sale made after the 31st December, 1881, incorporate in such contracts various conditions and stipulations (t) unless the same are expressly excluded, and by the 3rd section of the former Act and the 66th section of the latter Act trustees who are purchasers are authorized to buy without excluding the application of the Acts, and the 66th section of the latter Act expressly exonerates trustees and their solicitors from all liability for so doing, but nothing in that Act is to be taken to imply that the adoption in connection with or application to any contract or transaction of any further or other provisions, stipulations, or words is improper.]

6. Sect. 2 of The Conveyancing Act, 1882 (u) provides for an official search being made on the request of a purchaser for entries of judgments, Crown debts, [Official searches.]

(q) *Ingle v. Partridge*, 34 Beav. 412-414; [but see *Re Godfrey*, 23 Ch. D. 483, where trustees were held not liable though they had not made an independent valuation, and in all cases the true test seems to be whether the trustees have acted as prudent men would in dealing with their own property; and see *Re Pearson*, 51 L. T. N. S. 692.]

(r) See *Eastern Counties Railway Company v. Hawkes*, 5 H. L. Cas. 363.

[(s) 44 & 45 Vict. c. 41.]

[(t) For these conditions and stipulations see *ante* p. 438-440.]

[(u) 45 & 46 Vict. c. 39.]

and similar matters, and provides that when a solicitor acting for trustees obtains an office copy certificate of the result of the search under the section, the trustees shall not be answerable for any loss that may arise from error in the certificate.

[Yorkshire Register.]

7. As to lands situate in Yorkshire, "The Yorkshire Registries Act, 1884," (v) provides for an official search [* 501] of the register being * made at the request of any person, and further exempts any trustee, executor or other person in a fiduciary position who has obtained a certificate of the result of an official search or a certified copy of any document enrolled in the register, or of any entry in the register from any loss, damage, or injury that may arise from any error in such certificate or copy. And where a deed or will has been enrolled at full length, the comparison of an abstract with the copy so enrolled is to be a sufficient discharge of the duty to compare the abstract with the original document.]

Deposit.

8. As a *deposit* is almost invariably required upon a sale by auction, and not uncommonly by private contract, it is conceived that trustees would be justified upon signing the contract in paying a deposit in part discharge *de bene esse* of the purchase-money. But generally the character of trustee is pleaded as an excuse for not paying a deposit, and is allowed.

Where purchase-money is in Court.

9. Where the money is in *Court* the trustee must enter into a *conditional contract*, that is, "subject to the approbation of the Court," and then apply by petition or summons at chambers for the Court's sanction, and the practice is to direct any inquiry whether the proposed purchase is fit and proper, and if so, whether a *good title* can be made. "As long," said Sir G. Jessel, "as an estate is under the administration of the Court, the Court does not allow a purchase or mortgage or any other investment to be made, without seeing to its safety. The Court has to protect the property for all claimants, and a reference is made to ascertain the propriety of the investment, that is to say, its propriety in all respects" (w). And the practice is not to inquire whether a good title can be made *subject to the conditions*, but whether a good title can be made *absolutely*, and if in the course of investigation an objection to the title arises, it is brought under the attention of the judge, who then exercises his discretion (the whole title being before him), whether the objection

[(v) 47 & 48 Vict. c. 54, ss. 20, 23.]

(w) *Bethell v. Abraham*, 17 L. R. Eq. 27.

can be waived with reasonable safety (*x*). "Much too great laxity," observed V. C. Wood, "has been gaining ground amongst the advisers of those who have to manage trust property, and there is a disposition to rest satisfied with imperfect titles. I cannot approve of such a practice, and cannot permit trustees to take a defective title, even though it may be in accordance with the contract" (*y*).

10. Trustees for purchase have to look not only to the adequacy of *the *value* and the goodness [* 502] of the *title*, but also to the effect which the purchase will have upon the *relative interests* of the *cestuis que trust*. How purchase will affect the interest of cestuis que trust.

Thus where the property is directed by the settlement to be held in trust for a person for life with remainders over, a trustee might no doubt purchase an estate with a suitable *house* upon it, but (without saying that he could not legally do so) he ought not to purchase a house merely. This is a property of a wasting nature, and the tenant for life could not be compelled to preserve it against natural decay. A power to invest on *Government Annuities* would not justify the purchase of *Long Annuities*, and there is a similar difference between land and houses, the former being worth about thirty years purchase, and the latter much less, so that the tenant for life would be benefited at the expense of the remainderman (*z*). Purchase of houses.

11. Even a purchase of *ground rents* of houses, though coming under the description in the trust deed of "hereditaments," is not free from objection, for the object would of course be to procure for the tenant for life a higher income, but this would be at the cost of the remainderman in point of security. Should the houses be burnt down, and should the lessee have neglected to insure or the insurance monies not be forthcoming, the trustee might have nothing to show for the purchase but a worthless site, and then the remainderman might seek to hold him responsible as for a fraudulent execution of his trust in equity, though the purchase was within the words of trust according to the letter (*a*). However, it has been held that the purchase of freehold ground rents reserved upon building Ground rents.

(*x*) *Ex parte* The Governors of Christ's Hospital, 2 H. & M. 166.

(*y*) *Ex parte* The Governors of Christ's Hospital, 2 H. & M. 168.

(*z*) See *Moore v. Walter*, 8 L. T. N. S. 448.

(*a*) See *Read v. Shaw*, Sugd. Powers Append. 953; and see *Ib.* p. 864, 8th ed.; and *Middleton v. Pryor*, Amb. 393.

leases for ninety-nine years is justifiable under a power to purchase "hereditaments in fee-simple in possession" (b).

A timbered estate.

12. Again, if a sum be given to be laid out in the purchase of an estate to be settled on a person for life *without impeachment of waste*, with remainders over, trustees should not purchase a *wood estate*, as the tenant for life, on being put into possession, could by a fall of the timber possess himself of a great part of the capital or *corpus* of the fund (c); and, on the contrary, if the tenant for life were *impeachable for waste*, he would lose the fruit of so much as was the value of the timber (d). But trustees may purchase an estate where the timber forms no overwhelming proportion [* 503] of the value, *for it cannot be supposed that the trustees were meant to purchase land without trees upon it.

Mines.

13. Trustees again should not purchase *mines*; for if the mines be open, the tenant for life might exhaust them, and leave nothing to the remainderman; and if not open, the tenant for life, if impeachment for waste, would get nothing and the remainderman would take the whole (e)¹. But under *special circumstances* the Court has sanctioned the purchase of mines (f).

Adowsons.

14. *Adowsons* again would be very undesirable as a purchase, for though the adowson or any particular presentation (before a vacancy) might be sold, there would be no annual or regular fruit. The remainderman, *after* the tenant for life's death, might sell the adowson and get back all he was entitled to; but in the meantime the tenant for life would be reaping no benefit.

Copyholds for lives.

15. Copyholds for *lives*, if customarily renewable, might substantially be equal to freeholds, but they would not fall within the terms of a trust to purchase estates of *inheritance* (g).

(b) *Re Peyton's Settlement*, 7 L. R. Eq. 463.

(c) See the subject discussed in *Burges v. Lamb*, 16 Ves. 174.

[(d) But see now 45 & 46 Vict. c. 38, s. 35, under which a tenant for life impeachable for waste in respect of timber may cut and sell ripe timber and will be entitled to one-fourth of the proceeds.]

[(e) But see now 45 & 46 Vict. c. 38, ss. 6-11, under which the tenant for life whether impeachable for waste or not may grant mining leases and will be entitled to one-fourth or three-fourths of the mineral rents as the case may be.]

(f) *Bellot v. Littler*, W. N. 1874, p. 156.

(g) *Trench v. Harrison*, 17 Sim. 111. N. B. The words "of inheritance" in the marginal note, do not occur in the statement

¹ *Cadwalader's App.*, 64 Pa. St. 293.

16. Trustees having a trust or power to purchase must exercise a *joint* discretion as to the propriety of the purchase, and, therefore, as no man can be judge in his own case, they are precluded from buying from one of themselves. If such a purchase be really desirable, it might be carried out by a friendly suit for obtaining the sanction of the Court.

Trustees
buying from
one of them-
selves.

17. A trust or power to purchase is sometimes accompanied with a condition that it shall be with the *consent of the tenant for life*. In such a case can the trustees purchase from the tenant for life himself? It is now settled that trustees with a similar power of sale and exchange can neither sell to or exchange with the tenant for life (*h*), but this has always been regarded as hardly defensible on principle, and as an exception to the general rule. An exchange is in substance nothing more than a mutual sale, and when the simple case of a purchase by trustees from a tenant for life with power of consenting comes before the Court, it may be upheld, but in the meantime it would not be prudent for trustees, before actual decision, to incur the risk.

Consent of
tenant for
life.

18. Trustees, without a special power for the purpose, ought not *to purchase an *equity of redemption* merely (*i*), for the mortgagee might seek to foreclose, when there might be a difficulty of redeeming, or might sell over the heads of the trustees under the power of sale, or might consolidate his mortgage with some other mortgage on another estate of the mortgagor, and so oblige the trustees to redeem both.

Equity of
redemption.

19. It would not be too much to lay down the rule broadly that trustees should never purchase without getting the *legal estate*.

Should
always get
the legal
estate.

20. A trust to buy an estate will not justify the investment of part of the trust fund upon a purchase, and the expenditure of a further part upon *repairs and improvements* however substantial either of the purchased estate (*k*), or of an estate settled to the like uses (*l*). But in a recent case where money was be-

Repairs and
improve-
ments.

of the settlement in the body of the Report, but seem to be implied.

(*h*) *Howard v. Ducane*, T. & R. 81.

[(*i*) See *Ex parte Craven*, 17 L. J. N. S. Ch. 215; *Re Galbraith*, 10 L. R. Eq. 368, where the Court held that monies paid into Court, under the Lands Clauses Consolidation Act, 1845, ought not to be re-invested in the purchase of an equity of redemption.]

(*k*) *Bostock v. Blakeney*, 2 B. C. C. 653; *Drake v. Trefusis*, 10 L. R. Ch. App. 364.

(*l*) *Dunne v. Dunne*, 3 Sm. & G. 22; *Brunskill v. Caird*, 16 L. R. Eq. 493. But the Court by a liberal construction of the

queathed to be laid out on a purchase of land to be annexed to a settled estate, and part of the settled estate was the advowson of a rectory of which the parsonage house was so dilapidated as to require rebuilding, which the testator had contemplated, V. C. Malins held that the proposed expenditure was within the spirit of the trust, and that the trustees would be justified in applying a competent part of the trust fund for the purpose (*m*). And monies liable to be laid out on a purchase of lands to be settled to certain uses may be laid out in the erection of *new buildings*, though not in the *repair of old buildings* on the lands settled to those uses (*n*), [or in draining the lands in settlement (*o*).

[* 505] * 21. Now, by the Settled Land Act, 1882, sect. 33, money in the hands of trustees, and liable to be laid out in the purchase of land to be made subject to the settlement, may, at the option of the tenant for life, be invested or applied as capital money arising under the Act, and under this it may be made applicable for the improvements authorized by the Act (*p*).

Estates in
possession.

22. When the trust is to purchase an estate "*in possession*," it would not be competent to trustees to buy an *estate in reversion*; but, as already observed, under a power to purchase "*hereditaments in fee simple in possession*," trustees may buy ground-rents reserved upon building leases for ninety-nine years (*q*). But

Lands Clauses Consolidation Act, and the Leases and Sales of Settled Estates Act has assumed the jurisdiction of applying money stamped with a trust for purchase of real estate, in the improvement of estates settled to the uses of the estates directed to be purchased. See *Re Clitheroe's Trust*, W. N. 1869, p. 26; *Re Johnson's Trust*, 8 L. R. Eq. 348; *Re Incumbent of Whitfield*, 1 J. & H. 610; *Re Dummer's Will*, 2 De G. J. & S. 515; *Ex parte Rector of Claypole*, 16 L. R. Eq. 574; [*Re Speer's Trust*, 3 Ch. D. 262;] and see *Re Leigh's Estate*, 6 L. R. Ch. App. 887; *Re Newman's Settled Estates*, 9 L. R. Ch. App. 681; *Drake v. Trefusis*, 10 L. R. Ch. App. 366; *Re Hurle's Settled Estates*, 2 H. & M. 196. [But see *Re Venour's Settled Estates*, 2 Ch. D. 522, 526.]

(*m*) *Re Lord Hotham's Trusts*, 12 L. R. Eq. 76; *Re Curzon's Trust*, V. C. Malins, 8 May, 1874. But see *Brunskill v. Caird*, 16 L. R. Eq. 495, and *Re Nether Stowey Vicarage*, 17 L. R. Eq. 156.

(*n*) *Drake v. Trefusis*, 10 L. R. Ch. App. 364; [*Re Leslie's Settlement Trusts*, 2 Ch. D. 185; *Re Lytton's Settled Estates*, W. N. 1884, p. 193; *Re Stock's Devised Estates*, 42 L. T. N. S. 46; and see *Donaldson v. Donaldson*, 3 Ch. D. 743.]

(*o*) *Re Leslie's Settlement Trusts ubi sup.* [As to improvements under the Settled Land Act, see *post*, Chap. xxii.]

[(*p*) See *post*, Chap. xxii.]

(*q*) *Re Peyton's Settlement*, 7 L. R. Eq. 463.

where the leases are of short duration, and the ground-rents are low as compared with the rental of the property when it falls into possession, the purchase of the ground-rents would be for the advantage of the remaindermen at the expense of the tenant for life.

23. Where the trust fund is in Court, it is still the duty of the trustees to watch the administration, and see that the purchase is a proper one, unless all the beneficiaries, whether under disability or not, are before the Court, and then the *cestuis que trust* by themselves or their guardians can look after their own interests, and the trustees are exonerated (r). Fund in Court.

24. The costs of the purchase are to be considered as part of it, and will come out of the same fund. The trustees, therefore, should provide for the costs, as well as for the purchase-money, though if this were not done, they would still have a lien for the costs properly incurred upon the estate purchased (s). Costs.

25. The trustees, where the money is not under administration by the Court, need not *disclose the trust* to the vendor, either in the contract or in the conveyance. If they do so, it will embarrass the vendor by obliging him to see that the purchase-money is properly applied in pursuance of the trust. Whether trust to be disclosed.

26. Where the legal estate is required to be vested in the trustees, they should, contemporaneously with the completion of the purchase, execute a formal declaration of trust, either by indorsement on the conveyance or by a separate instrument with notice of it indorsed on the conveyance; as otherwise the survivor would have it in his power to deal with the property as his own. Where notice of the trust to the vendor cannot be avoided, the declaration of trust may be embodied in the conveyance itself. This to some * extent lengthens the conveyance, and the [* 506] vendor might in strictness claim the extra costs; but such a claim is very seldom, if ever, heard of in practice. Declaration of trust.

27. A *declaration of trust*, or some notice tantamount to it, not only obviates fraud on the part of the trustee, but is also desirable on another account. If the estate purchased be not ear-marked at the time as subject to the trust, serious questions might afterwards arise between the *cestuis que trust* and the representatives of the trustee, who are the persons entitled to the property, viz., whether the estate was purchased with the trust fund or from the trustee's private resources, and Consequences of no declaration of trust.

(r) *Davis v. Combermere*, 9 Jur. 76.

(s) *Gwyther v. Allen*, 1 Hare, 505.

the evidence upon this issue might entail infinite expense (t).

[Trustee providing part of purchase-money.]

[28. Where an estate is purchased by trustees, but, the trust funds being insufficient to provide the whole purchase-money, one of the trustees provides the sum necessary to complete the purchase, the trust estate is entitled to a first charge upon the estate for the amount of the trust fund, and subject to such charge the trustee is entitled to be indemnified out of the estate in respect of the sum provided by him, and subject to such indemnity the real estate belongs to the trust (u).]

Whether the settlement should be in the conveyance.

29. Where the legal estate is not required to be vested in the trustees, but is to be limited *to the use of the beneficiaries*, the first question is, whether the limitations should be inserted in the conveyance itself, or whether the conveyance should be to the trustees, and a settlement executed subsequently. The answer must depend on the particular circumstances of each case, and whether the vendor will or not offer any objection, though it is conceived that on the purchaser undertaking to pay any extra costs to be thereby occasioned, the vendor could not object.

Whether to be referential.

30. Another practical question is, whether the limitations of the settlement to which the new purchase is to be subjected should be set out at length, or be *incorporated by reference*. In either case the trustees must be careful to ascertain the facts, as whether the owners of the successive estates have in any and what way dealt with their respective interests.

Form of referential Settlement.

31. If it be proposed to settle the property by *referential* words, caution must be used so as to preserve the rights of the beneficiaries intact. Suppose, for instance, the trustees of a marriage settlement of real estate had disposed of it under a power of sale [*507] * and had laid out the proceeds in the purchase of another estate, and then granted the new property to A. and his heirs "to the uses and upon the trusts," &c., of the original settlement. If in this case a term of years was limited by the original settlement to trustees, and they are dead, no new term will be created, or if any tenant for life or remainderman had sold his interest, he would, nevertheless, take the like estate again, and the purchaser could have only an equity. It is impossible to provide *à priori* any form that would adapt itself to all cases; but the following, which was settled

(t) See *Mathias v. Mathias*, 3 Sm. & G. 552; *Price v. Blake-more*, 6 Beav. 507, and see *post*, Chap. xxx, s. 2.

(u) *Re Pumfrey*, 22 Ch. D. 255.]

by two eminent conveyancers, in a case where part of the settled estates had been sold and the proceeds re-invested, may be usefully inserted. The *habendum* was "to such uses as under and by virtue of the said indenture of settlement are now subsisting in the thereby settled hereditaments (now remaining unsold), and so that the said hereby assured hereditaments shall upon the execution of these presents be vested in the persons in whom the said thereby settled hereditaments (now remaining unsold) are now vested, and for the same estates and interests as are now vested in those persons respectively in the same hereditaments under or in consequence of that indenture, and shall be subject to the same trusts, powers and provisions as the said thereby settled hereditaments (now remaining unsold) are now subjected to or affected by, under or in consequence of the same indenture, and so as to give effect to, but so as not to multiply or increase any charge subsisting under that indenture or thereby authorized to be created."

32. It has hitherto been assumed that the directions for the limitations in the settlement are clear in themselves, but it often happens that the trustees are involved in considerable perplexity from the ambiguity of the language in which the directions are given. We have to some extent anticipated this subject in a former page, under the general head of "executory trusts" (which comprise trusts for purchase and settlement) (*v*), but some further observations may here be introduced, with reference to the particular branch of executory trusts now under consideration.

Directions
for settle-
ment.

33. When trustees have to settle the estate upon a person for life with remainders over or in strict settlement, the question at once suggests itself whether the tenant for life is or not to be made *impeachable for waste*. The *primâ facie* rule appears to be that he shall (*w*), but there are important exceptions. Thus, where a larger estate than for life is given in the first instance, but it is afterwards * cut down by [* 508] directions for a strict settlement, the Court does not consider itself justified in reducing the interest first taken beyond the clear intention, but limits a life estate without impeachment for waste (*x*). Again, where

Impeach-
ment for
waste.

(*v*) See *ante*, p. 113.

(*w*) *Davenport v. Davenport*, 1 H. & M. 775; *Stanley v. Coulthurst*, 10 L. R. Eq. 259.

(*x*) *Davenport v. Davenport*, 1 H. & M. 779, *per* V. C. Wood; *Sackville-West v. Viscount Holmesdale*, 4 L. R. H. L. 543.

a testator directed a settlement to be made on A. and the heirs of his body (which would have left him tenant in tail), and then added that "it was never to be in the power of A. to dock the entail during his life," A. was declared to be tenant for life without impeachment of waste (y). And the like construction prevailed where a testator constituted A. "his heir," but desired that it should "be secured for the benefit of A.'s family" (z). Again, where a testator directed the property to be "closely entailed," the Court cut it down to a tenancy for life with remainder to the issue, but exempted the tenant for life from impeachment for waste (a).

"To be strictly settled."

34. In another case, where the direction was that the estate should be "*strictly settled*," the limitation to the tenant for life was without impeachment for waste (b), and V. C. Wood observed, with reference to this decision, that it was sustainable on the ground that the term "strict settlement" without more was understood in accordance with the common form of such instruments to imply estates for life without impeachment of waste (c).

Concurrence of all the *cestuis que trust*.

35. If the parties beneficially interested are under no disability and can agree together as to the disposition of the fund before investment or of the estate after investment, the trustees will be bound to obey their joint wishes, and must deal with the property in the manner directed by their joint order.

(y) *Leonard v. Sussex*, 2 Vern. 526. See 1 H. & M. 778.

(z) *White v. Briggs*, 15 Sim. 17 & 300.

(a) *Woolmore v. Burrows*, 1 Sim. 512. See 1 H. & M. 778.

(b) *Bankes v. Le Despencer*, 10 Sim. 576; 11 Sim. 508; and see *Loch v. Bagley*, 4 L. R. Eq. 122.

(c) *Davenport v. Davenport*, 1 H. & M. 779.

DUTIES OF TRUSTEES FOR PAYMENT OF DEBTS.

UNDER this head we shall treat,—*First*, Of the *validity* of a trust for payment of debts; *Secondly*, What creditor deeds are *revocable*; and *Thirdly*, Of the *duties* of trustees for payment of debts.

SECTION I.

OF THE VALIDITY OF THE TRUST.

1. A TRUST for payment of debts may be created either by *will* or by act *inter vivos*.

2. A trust created by *will* for payment of debts out of *personal estate* is so far a nullity, that the executor is bound, at all events, to provide for the payment of debts out of the assets in a due course of administration, and would not be justified in the breach of this legal obligation by pleading any expression of intention on the part of the testator. It is only as respects any *surplus* personal estate after payment of debts that the executor ought to regulate his administration by the directions of the will. A devise, however, of *real estate* for payment of debts is in all cases unimpeachable, for the statutes that have avoided devises as against specialty creditors (*d*), and now as against simple contract creditors (*e*), have expressly accepted devises for payment of debts.¹

(*d*) 11 G. 4 & 1 W. 4, c. 47.

(*e*) 3 & 4 W. 4, c. 104.

¹ In the United States, where lands have always been assets for the payment of the debts of a decedent, testamentary trusts for the payment of debts will be void even of real estate. *Smith v. Porter*, 1 Binn. 209; *Mun v. Warner*, 4 Whart. 455; *Steele v. Steele's Adm'r.*, 64 Ala. 460; *Hall v. Bumstead*, 20 Pick. 2. But the creditors may assent to such a trust and be thereby estopped from claiming a legal settlement of the estate after the executor has settled it in accordance with the directions of the will; *Bank v. Beverly*, 1 How. 134.

Trust created
by act *inter*
vivos attended
with fraud.

Person not a
trader might
create trust
for payment
of debts.

3. As to trusts created by act *inter vivos*, a trust for payment of debts will in all cases be void, if vitiated by *actual fraud*, as if the debtor by an understanding between him and his trustees be left in possession of the estate so as to obtain a fictitious credit (*f*).¹

[* 510] * 4. Under the old bankruptcy laws, a broad distinction was made between non-traders and traders. If the settlor was *not a trader* he was not amenable to the bankrupt laws, and therefore was at perfect liberty to dispose either of the whole (*g*) or of *part* of his property (*h*), for payment of *all* (*i*), or *any number* of his creditors (*k*). The argument formerly urged for the invalidity of such a trust was that 13 Eliz. c. 5 (*l*) avoided "all alienations contrived of *fraud*, to delay creditors and others of their just debts," &c. But with respect to a trust for the satisfaction of creditors *generally*—"How," said Le Blanc, J., "can it be fraudulent for a person not the object of the bankrupt laws to make the same provision voluntarily for the benefit of all his creditors which the law compels to be done in the case of a bankrupt trader?" (*m*);² and if the settlor direct the payment of *particular* debts only, "It is neither illegal nor immoral," said Lord Kenyon, "to prefer one set of creditors to another" (*n*). Nor did

(*f*) Twyne's case, 3 Rep. 80 a; Wilson v. Day, 2 Burr, 827; Hungerford v. Earle, 2 Vern. 261; Tarback v. Marbury, 2 Vern. 510; Law v. Skinner, W. Bl. 996; and see Worseley v. De Matos, 1 Burr. 467; Stone v. Grantham, 2 Buls. 218; Pickstock v. Lyster, 3 M. & S. 371; Dutton v. Morrison, 17 Ves. 197.

(*g*) Ingliss v. Grant, 5 T. R. 530; Nunn v. Wilshire, 8 T. R. 528, *per* Lord Kenyon; Pickstock v. Lyster, 3 M. & S. 371; Leonard v. Baker, 1 M. & S. 251; see Meux v. Howell, 4 East, 1. As to what property will pass by general words in a creditors' deed and whether the trustees can disclaim any part which is a *damnosa possessio*, see How v. Kennett, 3 Ad. & Ell. 659; Carter v. Warne, Moo. & Ma. 479; West v. Steward, 14 M. & W. 47.

(*h*) Estwick v. Caillaud, 5 T. R. 420; Goss v. Neale, 5 Taunt. 19; see Meux v. Howell, 4 East, 1.

(*i*) Meux v. Howell, 4 East, 1; Ingliss v. Grant, 5 T. R. 530; Pickstock v. Lyster, 3 M. & S. 371; Leonard v. Baker, 1 M. & S. 251.

(*k*) Estwick v. Caillaud, 5 T. R. 420; Nunn v. Wilshire, 8 T. R. 528, *per* Lord Kenyon; Goss v. Neale, 5 Taunt. 19; Wood v. Dixie, 7 Q. B. 892.

(*l*) Perpetuated 29 Eliz. c. 5.

(*m*) Meux v. Howell, 4 East, 9.

(*n*) Estwick v. Caillaud, 5 T. R. 424; [Alton v. Harrison, 4 L. R. Ch. App. 622; Boldero v. London and Westminster Discount Company, 5 Ex. D. 47.]

¹ Jessup v. Hulse, 29 Barb. 539; Wilson v. Gray, 2 Stock. 233; Rogers v. Vail, 16 Vt. 329.

² Wilt v. Franklin, 1 Binn. 514.

the creation of such a trust fall within the scope of the Act; for "it is not every feoffment, judgment, &c.," said Lord Ellenborough, "which will have the effect of delaying or hindering creditors of their debts, &c., that is therefore fraudulent within the statute; for such is the effect *pro tanto* of every assignment that can be made by one who has creditors: every assignment of a man's property, however good and honest the consideration, must diminish the fund out of which satisfaction is to be made to his creditors. But the feoffment, judgment, &c., must be *devised of malice, fraud, or the like*, to bring it within the statute: the Act was meant to prevent deeds, &c., fraudulent in their *concoction*, and not merely such as in their *effect* might delay or hinder other creditors" (o).

5. If the settlor was a *trader*, then by 12 & 13 Vict. **Fraudulent c. 106, s. 67 *** (being a re-enactment of the [* 511] **conveyance.** previous statutes), it was declared that "any *fraudulent* conveyance, with intent to defeat or delay creditors, should be deemed an act of bankruptcy;" and it was adjudged fraudulent within the meaning of this clause, if a person assigned the *whole* of his property (p) (whether expressed to be the whole or not in the deed (q)), or all but a *colourable* part (r), or all

(o) *Meux v. Howell*, 4 East, 13, 14; [and see *Spencer v. Slater*, 4 Q. B. D. 13.]

(p) *Nunn v. Wilsmore*, 8 T. R. 528, *per* Lord Kenyon; *Alderson v. Temple*, 4 Burr. 2240, *per* Lord Mansfield; *Hooper v. Smith*, 1 W. Bl. 441, *per eundem*; *Wilson v. Day*, 2 Burr. 827; *Rust v. Cooper*, Cowp. 632, *per* Lord Mansfield; *Leake v. Young*, 5 Ell. & Bl. 955; *Bowker v. Burdekin*, 12 M. & W. 128; *Johnson v. Fesenmeyer*, 25 Beav. 88; *Smith v. Cannan*, 2 Ell. & Bl. 35. But see the recent case of *Ex parte Gass*, 2 I. R. Eq. 284, in which it was held (though the decision rested on other grounds), that the question of fraud is one of fact, and therefore if under the peculiar circumstances the Court is satisfied that the conveyance of the bankrupt's *whole* property was *bona fide*, and with a view to pay his creditors rather than to defeat them the deed will be supported.

(q) See *Dutton v. Morrison*, 17 Ves. 193; *Lindon v. Sharp*, 6 Man. & Gr. 905. But the assignment of all his property at a certain place is not an act of bankruptcy, unless it be proved that he had no other property; *Chase v. Goble*, 2 Man. & G. 930.

(r) *Law v. Skinner*, 2 W. Bl. 996; *Hooper v. Smith*, 1 W. Bl. 442, *per* Lord Mansfield; *Wilson v. Day*, 2 Burr. 832 *per eundem*; *Alderson v. Temple*, 4 Burr. 2240, *per eundem*; *Estwick v. Cailaud*, 5 T. R. 424, *per* Lord Kenyon; *Gayner's case*, cited 1 Burr. 477; *Compton v. Bedford*, 1 W. Bl. 368; *Johnson v. Fesenmeyer*, 25 Beav. 83; *Ex parte Foxley*, 3 L. R. Ch. App. 515.

the stock, without which he could not carry on his trade (s).¹

Grounds of
the rule.

6. It was immaterial whether the trust was for any particular creditor (t), or a certain number of them (u), or all the creditors at large (v), for by the assignment of his whole substance the bankrupt became utterly insolvent; and if the trust was for one or some only of his creditors, it was a fraud upon the rest, and if it was for all the creditors, it was a fraud upon the spirit of the bankruptcy laws, which require a bankrupt's estate to be under the management of certain commissioners and assignees appointed as prescribed by the legislature—not of persons nominated by the debtor himself, and so more likely to further his views than promote the interest of the creditors (w).

Where deed
could be
supported.

[* 512] * 7. But in order to avoid the deed, there must have been in existence a debt due at the time of its execution (x); and the assignment, though void as against creditors and the assignees in bankruptcy (y), was good as between the parties themselves (z). And assignments for valuable consideration at the full price, where the purchaser was not party or privy to the fraudulent designs of the vendor (a), or for less than

(s) *Hooper v. Smith*, 1 W. Bl. 442; *Law. v. Skinner*, 2 W. Bl. 996; *Siebert v. Spooner*, 1 M. & W. 714; *Porter v. Walker*, 1 Man. & Gr. 686; *Ex parte Bailey*, 3 De G. M. & G. 534; *Ex parte Taylor*, 5 De G. M. & G. 392; *Laffen v. Liffen*, 4 Giff. 75; and see *Ex parte Hawker*, 7 L. R. Ch. App. 214.

(t) *Wilson v. Day*, 2 Burr. 827; *Hassell v. Simpson*, 1 B. C. C. 99; S. C. Doug. 89, note; *Hooper v. Smith*, 1 W. Bl. 442, *per* Lord Mansfield; *Worseley v. De Mattos*, 1 Burr. 467; *Newton v. Chantler*, 7 East, 138.

(u) *Ex parte Foord*, cited *Worseley v. De Mattos*, 1 Burr. 477; *Alderson v. Temple*, 4 Burr. 2240, *per* Lord Mansfield; *Butcher v. Easto*, Doug. 282; *Devon v. Watts*, Doug. 86; *Hooper v. Smith*, 1 W. Bl. 442, *per* Lord Mansfield.

(v) *Kettle v. Hammond*, 1 Cooke's B. L. 108, 3rd edit.; *Eckhardt v. Wilson*, 8 T. R. 140; *Tappenden v. Burgess*, 4 East, 230; *Dutton v. Morrison*, 17 Ves. 199, *per* Lord Eldon; *Simpson v. Sikes*, 6 M. & S. 312.

(w) See *Dutton v. Morrison*, 17 Ves. 199; *Worseley v. De Mattos*, 1 Burr. 476; *Simpson v. Sikes*, 6 M. & S. 312.

(x) *Ex parte Taylor*, 5 De G. M. & G. 392; *Ex parte Thomas*, De Gex, 612; *Ex parte Louch*, De Gex, 463. *Oswald v. Thompson*, 2 Exch. 215.

(y) *Doe v. Ball*, 11 M. & W. 531.

(z) *Bessy v. Windham*, 6 Q. B. 166.

(a) *Baxter v. Pritchard*, 1 Ad. & Ell. 456; *Rose v. Haycock*, Ib. 460; *Smith v. Hurst*, 10 Hare, 30.

¹ A general assignment for the benefit of creditors has been held to be an act of bankruptcy under the bankrupt law of the United States; see Brightly's Annotated Bankrupt Law of the United States, p. 72.

the full price, if the transaction was *bonâ fide* (b), and mortgages made *bonâ fide* for fresh advances (c), or to secure payment of old debts and further advances combined (d), were not acts of bankruptcy and could not be impeached; and a conveyance and assignment by a trader *bonâ fide* of all his property substantially to trustees upon trust to convert into money and hold the proceeds upon trust for the settlor, or his appointees, was not an act of bankruptcy (e).

8. A fraudulent deed was an act of bankruptcy, notwithstanding a proviso declaring it void *if the trustees thought fit* (f), or *if all the creditors should not execute (the acts of the trustees to be good in the meantime)* (g); or *if all the creditors to a certain amount should not execute by such a time, or a commission of bankruptcy should issue* (h). So it was an act of bankruptcy, though the trustees at the time of the execution of the deed did not intend to act upon it (for the fraud was to be referred to the *animus* of the trader) (i); and though the trustees induced the debtor to execute it, with the object of making it an act of bankruptcy (k); and though the debtor himself meant it to be taken as an act of bankruptcy (l).

What concomitant circumstances would not vary the rule.

9. But if A., B., and C. agree to execute an assignment as a joint transaction, and A. executed, but B. and C. refused, then, as the assignment of A. was made on the footing and faith of B. and C.'s concurrence, and therefore could not be enforced against A. individually and solely, it was no act of bankruptcy (m).

No act of bankruptcy, if deed could not be enforced.

10. An assignment executed abroad was at one time held to be * no act of bankruptcy in England (n); [* 513] but in this respect the law has been altered by statute (o).

Assignment executed abroad.

(b) *Lee v. Hart*, 10 Exch. 555.

(c) *Bittlestone v. Cooke*, 6 Ell. & Bl. 296; *Hutton v. Cruttwell*, 1 Ell. & Bl. 15; *Harris v. Rickett*, 4 H. & N. 1; *Re Colemere*, 1 L. R. Ch. App. 128.

(d) *Whitmore v. Dowling*, 2 Foster & Finlason, 134.

(e) *Greenwood v. Churchill*, 1 M. & K. 546; and see *Berney v. Davison*, 1 Brod. & B. 408; 4 Moore, 126.

(f) *Tappenden v. Burgess*, 4 East, 230.

(g) *Back v. Gooch*, 4 Camp. 232; S. C. Holt, 13.

(h) *Dutton v. Morrison*, 17 Ves. 193.

(i) *Tappenden v. Burgess*, 4 East, 230.

(k) *Id.*

(l) *Simpson v. Sikes*, 6 M. & S. 295.

(m) *Dutton v. Morrison*, 17 Ves. 193, see 202; and see *Bowker v. Burdekin*, 11 M. & W. 128.

(n) *Norden v. James*, 2 Dick. 533; *Ingliss v. Grant* 5 T. R. 530.

(o) 6 G. 4 c. 16, s. 3, repealed and re-enacted by 12 & 13 Vict. c. 106, s. 67, re-enacted in effect by 32 & 33 Vict. c. 71, s. 6; [46 & 47 Vict. c. 52, s. 4.]

Creditors 11. If any creditors either *concurred* in the assign-
codecurring or ment (*p*), or subsequently *acquiesced* in it (*q*), they
acquiescing could not afterwards treat it as an act of bankruptcy,
 could not treat it as an act of bank-
*act of bank-*ruptcy. rutors could not have been impeached under a fiat sued
 out by a creditor, could not be impeached under the
 bankrupt's own fiat (*r*).

Trader might 12. If a person assigned *part* only of his property
assign part in in trust for creditors, then if the transaction was *fair*
trust for his and *bonâ fide*, and in the ordinary course of business,
creditors. or upon the pressure of the creditors, it was not open to
 objection (*s*); but if the settlor contemplated bank-
*Unless he*ruptcy (*t*), or even thought it probable, though not in-
*contemplated*evitable (*u*), and wished to give an undue preference
bankruptcy. to certain creditors over others, it was *fraudulent*, and
 constituted an act of bankruptcy.

Assent or 13. Although the deed was void for any reason at
acquiescence. law, yet it might be supported in equity as to cred-
 itors who had assented to it, or acquiesced in it, though
 without actual execution (*v*).

Where trust 14. On the other hand, a creditor was not bound by
valid, the the arrangement but might recover his whole debt, if
terms must the terms of the composition were not strictly and lit-
be strictly [* 514] erally fulfilled; for *cujus est dare * ejus est dis-*
observed.

(*p*) *Eckhardt v. Wilson*, 8 T. R. 142, *per Cur.*; *Bamford v. Baron*, 2 T. R. 594, note (*a*); *Tappenden v. Burgess*, 4 East, 230, *per Lord Ellenborough*; *Ex parte Cawkwell*, 1 Rose, 313.

(*q*) *Ex parte Crawford*, 1 Chris. B. L. 97, 140; *Ex parte Low*, 1 G. & J. 84, *per Lord Eldon*; *Ex parte Cawkwell*, 1 Rose, 313; *Ex parte Shaw*, 1 Mad. 598; *Back v. Gooch*, 4 Camp. 432; S. C. Holt, 13.

(*r*) *Ex parte Philpot*, De Gex, 346; *Ex parte Louch*, Id. 463; *Ex parte Thomas*, Id. 612.

(*s*) *Hale v. Allnutt*, 18 C. B. 505; *Wheelwright v. Jackson*, 5 Taunt. 109; *Hartshorn v. Slodden*, 2 B. & P. 582; *Fidgeon v. Sharp*, 5 Taunt. 539; *Small v. Oudley*, 2 P. W. 427; *Cock v. Goodfellow*, 10 Mod. 489; *Compton v. Bedford*, 1 W. Bl. 362, *per Lord Mansfield*; *Hooper v. Smith*, 1 W. Bl. 441; *Alderson v. Temple*, 4 Burr. 2240, *per Lord Mansfield*; *Wilson v. Day*, 2 Burr. 830, *per eundem*; *Ib.* 831, *per Foster and Wilmot*; *Jacob v. Shepherd*, cited *Worseley v. De Mattos*, 1 Burr. 478; *Harman v. Fisher*, Cowp. 123, *per Lord Mansfield*; *Rust v. Cooper*, Cowp. 634, *per eundem*; *Ex parte Scudamore*, 3 Ves. 85; and see *Estwick v. Caillaud*, 5 T. R. 424; *Newton v. Chantler*, 7 East, 144; *Johnson v. Fesenmeyer*, 25 Beav. 88; *Ex parte Gass*, 2 I. R. Eq. 284.

(*t*) *Linton v. Bartlet*, 3 Wils. 47; *Morgan v. Horseman*, 3 Taunt. 241; *Alderson v. Temple*, 4 Burr. 2238; *Round v. Byde*, 1 Cooke, B. L. 114, 3rd ed.; *Devon v. Watts*, Doug. 86; *Pulling v. Tucker*, 4 B. & Ald. 382; *Harman v. Fisher*, Cowp. 117.

(*u*) *Poland v. Glyn*, 2 D. & R. 310; *Guthrie v. Crossley*, 2 C. & P. 301.

(*v*) *Spottiswoode v. Stockdale*, G. Coop. 102; *Re Baber's Trust*, 10 L. R. Eq. 554.

ponere, and the creditor has a right to prescribe the conditions of his indulgence (*w*).

15. [By the Bankruptcy Act, 1869, (32 & 33 Vict. c. [Bankruptcy Act, 1883.] 71, which repealed 12 & 13 Vict. c. 106, and the subsequent Bankruptcy Act of 1861), the law of bankruptcy was put upon a new footing. But this Act has itself been repealed by the Bankruptcy Act, 1883 (*x*), which has again introduced a new law of bankruptcy. All persons, whether *traders* or *otherwise*, are now amenable to the bankruptcy laws. By the 4th section of the late Act the following acts (amongst others) are made acts of bankruptcy, viz—

1. That the debtor has in England or elsewhere made a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally. Acts of bankruptcy.

2. That the debtor has in England or elsewhere made a fraudulent conveyance, gift, delivery, or transfer of his property, or any part thereof.

3. That the debtor has in England or elsewhere made any conveyance or transfer of his property or any part thereof, or created any charge thereon which would under that or any other Act be void as a fraudulent preference if he were adjudged bankrupt (*y*). Limitation of time.

But by the 6th section a creditor is not to be entitled to present a bankruptcy petition against a debtor unless the act of bankruptcy has occurred within *three months* before the presentation of the petition for adjudication. Until the expiration, therefore, of these three months] the trustees of a creditors' deed must forbear to act, or their proceedings may be overridden by a subsequent adjudication of bankruptcy. However, the trustees may begin the exercise of their office at an earlier day if they can only satisfy themselves either that all the creditors have concurred or acquiesced in the deed, or that such as have not cannot either collectively or individually prove a debt or debts in the requisite amount to support an adjudication of bankruptcy.

Now that the distinction between traders and non-traders has substantially been abolished, what before was a fraudulent conveyance as to traders only, will be a fraudulent conveyance as to non-traders also (*z*).

(*w*) *Sewell v. Musson*, 1 Fern. 210; *Mackenzie v. Mackenzie*, 16 Ves. 374, *per* Lord Eldon; *Leigh v. Barry*, 3 Atk. 583, *per* Lord Hardwicke; *Ex parte Bennett*, 2 Atk. 527, *per eundem*; and see *Fuller v. Lance*, 7 Vin. Ab. 136.

[(*x*) 46 & 47 Vict. c. 52.]

[(*y*) As to what constitutes a fraudulent preference under the Act, see sect. 48.]

(*z*) *In re Wood*, 7 L. R. Ch. App. 302.

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* SECTION II.

WHAT CREDITORS' DEEDS ARE REVOCABLE.

Irrevocable trusts.

1. THE existence of a debt is always a sufficient consideration to support an assurance as valid and irrevocable as against the grantor (*a*); indeed the assurance will almost always assume the form either of a conveyance in satisfaction or part satisfaction of the debt (in which case the extinction or partial extinction of the debt forms the consideration), or of a security accompanied with a forbearance to sue (*b*). Thus if A. be indebted to B., and convey an estate to him by way of security, the deed, though no money passed at the time, and there was no previous arrangement, cannot be revoked by A., but B. may insist on the benefit of it (*c*). And if the creditor be not a party to the deed, yet if, by arrangement between him and the debtor, an estate is vested in a trustee for securing the debt, he can enforce the trust (*d*). Even where a debtor entered into an arrangement with three of his creditors, and in pursuance thereof, by a deed between himself of the first part, the three creditors of the second part, and his other creditors of the third part, conveyed all his real and personal estate to the three creditors, in trust for themselves and the other creditors, it was held that the intention was to make the creditors *cestuis que trust*, and that the deed was irrevocable; and no distinction was taken between the three creditors and the other creditors, although the latter apparently had not been in communication with the debtor previous to the deed, and had not executed it until some time afterwards (*e*).

(*a*) See *Rice v. Rice*, 2 Drew. 84. But a conveyance by way of security from a debtor to his creditor, where there is no pressure, may be a fraudulent preference within the meaning of the Bankruptcy Acts; *Goodricke v. Taylor*, 2 H. & M. 380; and, if the debtor's whole property be included, an act of bankruptcy; *Ex parte Trevor*, 1 Ch. D. 297; [and see 46 & 47 Vict. c. 52, s. 48.]

(*b*) It has been suggested, however, that a mere agreement to give a mortgage for a bygone debt, unaccompanied by any express stipulation as to forbearance, cannot be enforced. See *Crofts v. Feuge*, 4 Ir. Ch. Rep. 316; *Woodroffe v. Johnston*, 4 Ir. Ch. Rep. 319.

(*c*) *Siggers v. Evans*, 5 Ell. & Bl. 367; *Montefiore v. Browne*, 7 H. L. Cas. 241; *Morris v. Venables*, 15 W. R. 2.

(*d*) *Wilding v. Richards*, 1 Coll. 661.

(*e*) *Mackinnon v. Stewart*, 1 Sim. N. S. 76.

* 2. On the other hand, if a debtor, without [* 516] ^{Revocable trusts.} communication with his creditors, and, indeed, only from motives of personal convenience, as on going abroad (*f*), vest an estate in trustees upon trust to pay his debts, the trustees are mere *mandatories*, and the deed confers no right upon the creditors who are neither parties nor privies, and the debtor may at any time, at his pleasure, revoke or vary the trusts, or call for the re-transfer of the property (*g*). And if two persons have different interests in the same estate, and they, by arrangement between themselves, but without communication with any creditor, convey the property to trustees, upon trust to pay the debts of either party: here, though each may enforce the trust as against the other, yet the deed is revocable by both, and the creditor, as he neither required the security, nor was an object of bounty, cannot, while the deed remains revocable, compel the execution of the trust in his own favour (*h*). And *à fortiori*, this is the case if the payment of the debt is to be made only on the request of the settlor (*i*). But, of course, the trust cannot be revoked by the settlor, so as to defeat or prejudice what the trustees may have done previously in the due execution of the trust (*k*).¹

3. In *Garrard v. Lauderdale*, the Duke of York, by ^{Garrard v. Lauderdale.} indenture between himself of the first part, trustees of the second part, and the creditors of the third part, conveyed certain property to trustees upon trust for his creditors, and upon the execution of the deed a circular to that effect was sent to each of the creditors. Here there was ground for contending that, as the cred-

(*f*) *Cornthwaite v. Frith*, 4 De G. & Sm. 552.

(*g*) *Walwyn v. Coutts*, 3 Sim. 14; 3 Mer. 707; *Smith v. Keating*, 6 C. B. 136; *Acton v. Woodgate*, 2 M. & K. 492; *Henriques v. Bensusan*, 20 W. R. 350; *Browne v. Cavendish*, 1 Jon. & Lat. 606; [*Johns v. James*, 8 Ch. D. 744; *Re Sanders' Trusts*, 47 L. J. N. S. Ch. 667;] and see *Synnot v. Simpson*, 5 H. L. Cas. 121.

(*h*) *Gibbs v. Glamis*, 11 Sim. 584; *Simmonds v. Palles*, 2 Jon. & Lat. 489; and see *Synnot v. Simpson*, 5 H. L. Cas. 121.

(*i*) *Evans v. Bagwell*, 2 Conn. & Laws. 612.

(*k*) *Wilding v. Richards*, 1 Coll. 655, see 659; and see *Kirwan v. Daniel*, 5 Hare, 493.

¹ In the United States, where a *bond fide* assignment is made to trustees for the benefit of creditors, their assent is unnecessary, as it will be presumed, if the arrangement is for their benefit. *Gray v. Hill*, 10 S. & R. 436; *Brooks v. Marbury*, 11 Wheat. 78; *Weston v. Barker*, 12 Johns. 281; *DeForrest v. Bacon*, 2 Conn. 633; *Stewart v. Hall*, 3 B. Mon. 218; *Rankin v. Dwyer*, 21 Ala. 392. If the assignment is made directly to the creditors themselves, their assent is necessary thereto; although under some circumstances it will be presumed. *Tompkins v. Wheeler*, 16 Pet. 106.

itors had been induced by the notice to forbear suing the settlor, they had acquired a right to the execution of the trust, but Sir L. Shadwell, observing that the receipt of the circular was not admitted, and that, if received, yet the creditors had not refrained from suing, as they had proved against the Duke's estate, decided that the creditors had no equity to enforce the trust (*l*), and the decree, on appeal to Lord Brougham, was [* 517] affirmed (*m*). The authority, however, * of this case has, on several occasions, been questioned (*n*); and Lord St. Leonards observed he should be sorry to have it understood that a man may create a trust for creditors, communicate it to them, and obtain from them the benefit of their lying by until perhaps the legal right to sue was lost, and then insist that the trust was wholly within his power (*o*). There can be little doubt that upon the general principles of equity the settlor, by giving notice to the trustees, and by subsequent conduct, may confer on the creditors a right which they did not originally possess (*p*); and indeed it has now been decided that if property be assigned to a trustee, and he takes possession of it, and communicates with certain of the creditors, who express their satisfaction, the trust is irrevocable (*q*).

Trustee one
of the
creditors.

4. If the trustee be himself a creditor, the debt forms a sufficient consideration on behalf of the creditor, and the deed is irrevocable (*r*); and in one case, where property was vested in a trustee for creditors, and the trustee was a *surety* for some of the debts, it was held

(*l*) 3 Sim. 1.

(*m*) 2 R. & M. 451; and see *Cornthwaite v. Frith*, 4 De G. & Sm. 552; *Stone v. Van Heythuysen*, Kay. 727.

(*n*) See *Acton v. Woodgate*, 2 M. & K. 495; *Kirwan v. Daniel*, 5 Hare, 499; *Simmonds v. Palles*, 2 Jon. & Lat. 495, 504; *Siggers v. Evans*, 5 Ell. & Bl. 367. [But see *Johns v. James*, 8 Ch. D. 744, where the Court of Appeal approved of and followed *Garrard v. Lauderdale*; *Montefiore v. Browne*, 7 H. L. Cas. 241.]

(*o*) *Browne v. Cavendish*, 1 Jon. & Lat. 635; 7 Ir. Eq. Rep. 388.

(*p*) Perhaps the old case of *Langton v. Tracy*, 2 Ch. Rep. 30, was decided on this principle. for it appears that Tracy, the trustee, declared to the creditors that he would pay the debts, and that some of the debts were actually paid under the deed. The creditors may also have been privies, though not parties, to the execution of the trust, for it is stated that the settlor executed the deed to avoid prosecution against him by his creditors.

(*q*) *Harland v. Binks*, 15 Q. B. 713; *Nicholson v. Tutin*, 2 K. & J. 18; and see *Synnot v. Simpson*, 5 H. L. Cas. 121; *Cosser v. Radford*, 1 De G. J. & S. 585; [*John v. James*, 8 Ch. D. 744.]

(*r*) *Siggers v. Evans*, 5 Ell. & Bl. 367. [See *Johns v. James*, 8 Ch. D. 744.]

that, though the trust was revocable as to the general creditors, yet the trustee himself was not bound to reconvey the estate until the suretyship was satisfied (*s*).

5. It does not clearly appear from the authorities what is the precise nature of a *revocable* trust of this kind. The instrument is sometimes called a *deed of agency*, and if so, the trust must be considered at an end at the death of the settlor, and the property, so far as it has not been applied, must be administered as part of the settlor's assets (*t*). The trust is not regarded as revocable only during the life of the settlor, so as to give a vested interest to the creditor after his death, for it has been held that the creditor *has [* 518] no more equity to enforce the trust after a settlor's death than in his lifetime (*u*).

6. Suppose there is no fraud, but the trust deed is a mere *voluntary* settlement not founded on any arrangement with the creditors, but for the mere convenience of the debtor himself, so that it is revocable by the debtor at any time until communicated to some creditor (*v*)—in that case can a *creditor*, taking out execution, levy his debt upon the property subject to the trust? It seems, though the deed is *voluntary*, yet it is not to be considered as fraudulent within the statute 13 Eliz. c. 5, and if so, the creditor cannot reach the property at *law* (*w*). However, the deed might perhaps be held to be invalid as against the creditor in a Court of equity (*x*).

7. It has been doubted, whether the doctrine of revocability extends to a case where the trust is to come into operation only on the *death* of the settlor, and where subject to a trust for payment of debts the lands charged are conveyed by way of bounty to a third person, the presumption rather being that the creditors were also meant to be objects of the settlor's *bounty* (*y*).

8. The Courts at the present day consider the doc-

Nature of the
revocable
trust.

Post obit
trusts.

(*s*) Wilding v. Richards, 1 Coll. 655; and see Gurney v. Oranmore, 4 Ir. Ch. Rep. 470; S. C. 5 Ir. Ch. Rep. 436.

(*t*) Wilding v. Richards, 1 Coll. 655.

(*u*) Garrard v. Lauderdale, 3 Sim. 1; and see Synnot v. Simpson, 5 H. L. Cas. 139.

(*v*) Walwyn v. Coutts, 3 Mer. 707; S. C. 3 Sim. 14; Garrard v. Lauderdale, 3 Sim. 1; Acton v. Woodgate, 2 M. & K. 492; Kirwan v. Daniel, 5 Hare, 500; Harland v. Binks, 15 Q. B. 713.

(*w*) Pickstock v. Lyster, 3 M. & S. 371; Estwick v. Caillaud, 5 T. R. 420. But see Owen v. Body, 5 Ad. & Ell. 28.

(*x*) See Mackinnon v. Stewart, 1 Sim. N. S. 90; 91; Smith v. Hurst, 1 Coll. 705.

(*y*) Synnot v. Simpson, 5 H. L. Cas. 141.

Doctrine not likely to be extended. trine under which these deeds have been held revocable to have been carried far enough, and have expressed a disinclination to extend it (z).

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* SECTION III.

OF THE DUTIES OF TRUSTEES FOR PAYMENT OF DEBTS.¹

Duties of trustees.

UPON this subject we shall consider, *First*. What debts are to be paid; *Secondly*. In what order as regards *priority*; and, *Thirdly*. What *interest* is to be allowed.

First. What debts are within the scope of the trust.

Debts to be paid are *primâ facie* those at date of deed or death of testator.

1. If the trust be created by *deed*, then, unless a contrary intention be expressed, the debts only at the *date* of the deed will be intended (a); but if the provision be contained in a will, the direction will include all debts at the testator's death; unless he specially restrict his meaning to the debts at the making of his *will* (b).

"Debts affecting the estate."

2. Where a settlor by deed conveyed all his real and personal property upon trust to pay "all debts then owing by him, and which *affected the estates* thereby conveyed;" the trust, as the settlor had no *judgment* debts at the time, was extended to *bond* debts, but not to *simple contract* debts (c). But this distinction was taken upon a deed dated before the Acts making real estates assets for payment of simple contract debts.

Father providing for debts of son.

In another case a testator directed his trustees to apply 1000*l.* in releasing his son from his liabilities, should the testator not have done so in his lifetime. The son was an uncertificated bankrupt, and the Court considering that debts subsequently to the testator's death were not contemplated, discharged the debts up to that period out of the 1000*l.*, and gave the surplus to the testator's residuary legatee (d).

(z) *Wilding v. Richards*, 1 Coll. 659; *Kirwan v. Daniel*, 5 Hare, 499; *Simmonds v. Palles*, 2 Jon. & Lat. 495, 504; *Browne v. Cavendish*, 1 Jon. & Lat. 635; *Evans v. Bagwell*, 2 Conn. & Laws. 616.

(a) *Purefoy v. Purefoy*, 1 Vern. 28.

(b) *Loddington v. Kime*, 3 Lev. 433.

(c) *Douglas v. Allen*, 1 Conn. & Laws. 367; 2 Dru. & War. 213.

(d) *Re Landon's Will*, W. N. 1871, p. 240.

¹ The rule upon this subject is that trustees for creditors must act in accordance with the directions laid down in the assignment, unless those directions are set aside as contrary to law. *Perry on Trusts* (3rd Ed.) § 597.

3. A direction for payment of debts will not *revive* a debt barred by the Statute of Limitations (e), though the trustee or executor may have advertised for all creditors to come in and prove their debts (f); and, if a debt might with due diligence have been established, but there has been *laches* which under ordinary circumstances would be a bar to relief, the mere fact of the * creation and existence of a trust for payment [* 520] of debts will not justify the *laches* and enable the claimant to obtain relief (g). But a will may be so specially worded as to create a trust for creditors generally, notwithstanding any bar from the Statute of Limitations, for the debts still subsist though the remedy is gone (h);¹ and if there be a debt in fact not barred at the date of the deed, or at the death of the testator, the statute will not run afterwards (i); for it is not to be inferred that a man abandons his debt because he does not enforce payment at law when he has a trustee to pay him (k). Besides, unless delayed of necessity, the trustee ought to discharge the debt at once, and the universal rule is, that the *cestui que trust* ought not to suffer for the *laches* of the trustee (l). If a testator create a trust for payment of the debts of *another person deceased*, the debts to be paid are those which were not barred by the Statute of Limitations at the death of the person so deceased (m).

4. If a person who has been a bankrupt direct payment of twenty shillings in the pound upon the debts proved in the bankruptcy, the creditors are legatees, Legacy duty.

(e) *Burke v. Jones*, 2 V. & B. 275, where the previous cases are collected; *Hargreaves v. Michell*, 6 Mad. 326; *O'Connor v. Haslam*, 5 H. L. Cas. 170.

(f) *Jones v. Scott*, 1 R. & M. 255; 4 Cl. & Fin. 382; (overruling *Andrews v. Brown*, Pr. Ch. 385); and see *O'Connor v. Haslam*, 5 H. L. Cas. 177.

(g) *Harcourt v. White*, 28 Beav. 303.

(h) *Williamson v. Taylor*, 3 Y. & C. 208; see *Re Hepburn*, 14 Q. B. D. 394, 399.

(i) *Hughes v. Wynne*, T. & R. 307; *Crallan v. Oulton*, 3 Beav. 1; *Hargreaves v. Michell*, 6 Mad. 326; *Executors of Fergus v. Gore*, 1 Sch. & Lef. 107; and see *Morse v. Langham*, cited *Burke v. Jones*, 2 V. & B. 286; *O'Connor v. Haslam*, 5 H. L. Cas. 178.

(k) *Hughes v. Wynne*, T. & R. 309, *per Cur.*

(l) See *Executors of Fergus v. Gore*, 1 Sch. & Lef. 110.

(m) *O'Connor v. Haslam*, 5 H. L. Cas. 170.

¹ It has been held in America that an assignment by deed for the benefit of creditors or an assignment in insolvency will not prevent the Statute of Limitations from running. *Christy v. Flemington*, 10 Barr, 129; *Reed v. Johnson*, 1 R. I. 81. In *Gary v. May*, 16 Ohio 66, the English rule seems to have been followed.

and pay *legacy duty*, but there is *no lapse* though a creditor die in the testator's lifetime (n).

Statute of
Limitations.

5. Where a testatrix had devised an estate to trustees *upon trust to sell and pay debts*, but no part of the produce of sale had been set apart for that purpose, the right of the creditor was held by the late V. C. of England not to be within the exception of the 25th section of the Statute of Limitations, 3 & 4 W. 4, c. 27, but to fall under the 40th section; but that inasmuch as the debt had been acknowledged by the surviving trustee, the case was taken out of the statute (o). However, the opinion of the Vice Chancellor that the case was not within the 25th section would not, it is thought, now prevail, but the right of the creditor would subsist until adverse possession had run against his trustee (p).

But not as regards a testator's personality.

6. The rule that the creation of a trust keeps alive a debt not barred at the testator's death does not apply [*521] to a trust declared of ** personal estate* by will for the personalty vests in the executor upon trust for the creditors by act of law, so that the words of the will are nugatory (q). Nor does a devise of real estate upon trust to pay debts prevent the operation of the Statute of Limitations when the testator leaves no real estate to support the trust; *Re Hepburn*, 14 Q. B. D. 394.

Debt contracted by infant for necessities.
Case of a mortgagee with covenant for payment.

7. The terms of the trust will extend to the repayment of a sum of money borrowed by the settlor when an *infant* for the purchase of necessities (r).

8. Shall a *mortgagee* who has a covenant for payment of his debt be allowed to prove and receive a dividend upon the whole amount of his debt *pari passu* with the other creditors, or shall he prove only for the excess of the debt beyond the value of the security, or what rule is to govern the case? In bankruptcy the mortgagee proves only for the excess of the mortgage debt over the value of the security, so that he must first dispose of the estate (with the concurrence, if he has no power of sale, of the trustee in bankruptcy). [or assess the value of it.] and then prove for the difference. In the

(n) *Turner v. Martin*, 7 De G. M. & G. 429; *Re Sowerby's Trust*, 2 K. & J. 620; *Philips v. Philips*, 3 Hare, 281.

(o) *Lord St. John v. Boughton*, 9 Sim. 219.

(p) See *infra* as to the Statutes of Limitation.

(q) *Jones v. Scott*, 1 R. & M. 255; reversed 4 Cl. & Fin. 382; *Fraeke v. Cranefeldt*, 3 M. & Cr. 499; *Evans v. Tweedy*, 1 Beav. 55; *Crallan v. Oulton*, 3 Beav. 1; *Re Hepburn*, 14 Q. B. D. 394. N.B. In *Moore v. Petchell*, 22 Beav. 172, the doctrine established by *Jones v. Scott*, appears to have escaped notice.

(r) *Marlow v. Pittfield*, 1 P. W. 558.

administration of assets in Courts of equity, a mortgagee [was until recently] allowed to prove for his whole debt without being put on terms as to his security (s); [but by the Judicature Act, 1875 (t), the rule in equity has in insolvent estates been assimilated to that in bankruptcy]. The trust deed usually provides for the case of persons having specific liens, and ingrafts the principle established in bankruptcy. If there be no such clause, and if the deed provide that the creditor shall release his debt and all securities for the same, the mortgagee, by executing the deed, binds himself to the other creditors, notwithstanding any private arrangement to the debtor to the contrary, that he will not take advantage of his specific lien, but will bring it into the common stock and prove for his whole debt, and accept a dividend *pari passu* with the rest (u). "The moment," observed Lord Lyndhurst, "a creditor releases his debt, which he does by executing a deed of * this kind, there is, of course, an end of any [* 522] lien he may have for it" (v). But though the word "release" be used in the deed, it will not necessarily operate as an absolute and unconditional release, if the whole contents of the instrument, when taken together, show that such was not the intention (w).

9. It was held in *Dunch v. Kent* (x) that where there is a trust for payment of such creditors as shall come in within a year, a creditor who delays beyond the year is not therefore precluded from taking advantage of the trust; and in *Raworth v. Parker* (y), V. C. Wood, after observing that there was no modern authority in which relief had been given after the time fixed for the exe-

Trust for
creditors who
come in with-
in certain
time.

(s) See *Greenwood v. Taylor*, 1 R. & M. 185; *Mason v. Bogg*, 2 M. & Cr. 433; *Kome v. Young*, 4 Y. & C. 204; *Hanman v. Riley*, 9 Hare, App. xli.; *Ex parte Middleton*, 3 De G. J. & Sm. 201. The rule in equity was also held to apply in liquidations of joint stock companies, under the Companies' Act, 1862, *Kellock's case*, 3 L. R. Ch. App. 769. [By 38 & 39 Vict. c. 77, s. 10, the rule in bankruptcy has been adopted both in administrations of insolvent estates in Courts of Equity and in liquidations under the Companies' Acts, 1862 & 1867 of joint stock companies. By the Bankruptcy Act, 1883, s. 125, the estate of a person dying insolvent can now be administered in bankruptcy.]

(t) 38 & 39 Vict. c. 77, s. 10.]

(u) *Cullingworth v. Lloyd*, 2 Beav. 385; *Buck v. Shippan*, 1 Ph. 694; 14 Sim. 239.

(v) *Buck v. Shippan*, 1 Ph. 697.

(w) *Squire v. Ford*, 9 Hare, 47.

(x) 1 Vern. 260.

(y) 2 K. & J. 170, 171; and see *Collins v. Reece*, 1 Coll. 675; *Jolly v. Wallis*, 3 Esp. 228; *Spottiswoode v. Stockdale*, G. Coop. 102; *Johnson v. Kershaw*, 1 De G. & Sm. 260.

cution of the deed had expired, added, that if it were to be held that creditors are not admissible after the prescribed period, *Dunch v. Kent* must be overruled. And in a more recent case, where the trust was for the benefit of creditors who should execute or accede within three months, the Vice Chancellor held, and the decision was affirmed by the Lord Chancellor on appeal, that a creditor who had not acceded within the prescribed time might claim the benefit of the trust (z).

Adoption of deeds.

10. It is not necessary that a creditor, to entitle himself to the benefit of the deed, should execute it, but it will be sufficient if he assent to it, or acquiesce in it, or act upon its provisions, and comply with its terms (a). But the creditor must do some act to testify his acceptance of the deed, and not merely stand by and remain passive (b).

Disputed debt.

11. If the trustees permit a person to sign the deed as creditor in a certain sum specified in the schedule, they cannot afterwards contest the debt (c). But where there has been fraud, forgery, or perjury by the creditor, the trustees can apply to the Court to have the execution by the creditors set aside (d).

Trustee cannot arbitrarily admit a creditor who has repudiated the deed.

[* 523] * 12. A creditor who repudiates the deed by his acts, as by suing the debtor contrary to the provisions of the deed, will not be allowed afterwards (more particularly after a long lapse of time) to retrace his steps and take the benefit of the deed; and though the trustees should admit him to sign the deed, the other creditors will not be bound by the act of the trustees (e).

Discretion in trustees to admit creditors' claims.

13. A *discretion* is sometimes given to the trustees to admit or exclude such creditors as they shall think

(z) *Whitmore v. Turquand*, 4 J. & H. 444; 3 De G. & J. 107. V. C. Wood rested his judgment, not on the authority of *Dunch v. Kent*, but upon general reasoning, and thought that the decision in that might be accounted for on special grounds; but L. C. in affirming the judgment of the V. C. said that he considered the doctrine of the Court since *Dunch v. Kent*, to have been that a creditor might come in after the time prescribed, and that the time was not of the *essence* of the deed, and that, in his opinion, the view originally taken in *Raworth v. Parker* by V. C. Wood of *Dunch v. Kent* was the correct one.

(a) *Field v. Lord Donoughmore*, 1 Dru. & War. 227; *Biron v. Mount*, 24 Beav. 642, *Spottiswoode v. Stockdale*, G. Coop. 102; *Jolly v. Wallis*, 3 Esp. 228.

(b) *Biron v. Mount*, 24 Beav. 642.

(c) *Lancaster v. Elce*, 31 Beav. 325.

(d) *Lancaster v. Elce*, 31 Beav. 328, *per M. R.*

(e) *Field v. Donoughmore*, 1 Dru. & War. 227; reversing the decision of Lord Plunket, 2 Dru. & Walsh, 630; *Re Meredith*, 29 Ch. D. 745.

proper. The Court will endeavour, if possible, to withdraw the rights of the creditors from the caprice of the trustees (*f*); but if the settlement clearly give such a discretionary power, and the trustees are willing to exercise it, and no fraud be found, the Court cannot interfere to compel the admission of any particular creditor (*g*).

14. If the trustees have power of enlarging the time and advertise to that effect, but do not exercise the power, and so exclude a person who desires to come in, but could not do so before the day named in the deed, the creditor will be relieved in equity (*h*).

15. If there be trustees for payment of debts and legacies, and subject thereto upon trust for A. for life with remainder over, and the Court has taken an account of debts and legacies, and declared A. entitled to the possession, who is put into possession accordingly, it is not competent for the trustees afterwards to make an admission of some further debt, and to resume the possession in order to discharge it (*i*).

Relief in
equity.
Resumption
by trustees
of possession
after parting
with it.

16. If the debtor agree behind the back of the general creditors, to give an extra benefit to one particular creditor, such agreement is a fraud upon the general creditors, and illegal and void (*k*).¹

Secret agree-
ments.

Secondly. As to the order of payment.

1. Where the trust is created by will, the direction generally is for payment of "debts and legacies." As regards the administration of assets, creditors take precedence of legatees; but here, as both take under the will, and the testator has made no distinction, it seems upon strict principle, as was formerly held, that creditors *and legatees ought to be paid *pari passu* (*l*). However, there can be little doubt that the testator, although he may not have explicitly declared it, meant the creditors to precede, and the Courts ac-

Creditors
paid before
legatees.

(*f*) See *Nunn v. Wilsmore*, 8 T. R. 521; *Cosser v. Radford*, 1 De G. J. & S. 585.

(*g*) *Wain v. Egmont*, 3 M. & K. 445; *Drever v. Mawdesley*, 16 Sim. 511.

(*h*) *Raworth v. Parker*, 2 K. & J. 163. See *ante*, p. 522.

(*i*) *Underwood v. Hatton*, 5 Beav. 36.

(*k*) *Mare v. Sandford*, 1 Giff. 288.

(*l*) *Hixon v. Wytham*, 1 Ch. Ca. 248; *Gosling v. Dorney*, 1 Vern. 482; *Anon.* 2 Vern. 133; *Powell's case*, Nels. 202; *Wolestoncroft v. Long*, 1 Ch. Ca. 32; and see *Walker v. Meager*, 2 P. W. 552.

¹ *Lothrop v. King*, 8 Cush. 382; *Partridge v. Messer*, 14 Grey, 180.

cordingly (rather straining a point, that a man might not "sin in his grave") have now indisputably established that creditors shall have the priority (*m*).

All creditors
to be paid
pari passu.

2. As amongst the creditors themselves, the Court acts upon the well-known principle that "equality is equity," and, therefore, whether the trust be created by deed (*n*) or will (*o*), the specialty debts in the absence of express directions to the contrary will have no advantage over simple contract debts, but all will be paid in ratable proportions; and, of course, the trustees will not be allowed to break in upon the rule of equality by first discharging their own debts (*p*).¹

Specialty
creditors.

3. It was formerly ruled, that where a testator charged his freehold estate with debts, and the estate subject to the charge descended to the heir, the specialty creditor had precedence, for it was argued that he had his remedy at law against the heir independently of the will, and therefore ought not to be put on a level with those taking under the will (*q*). The answer is, that the specialty creditor has no *lien* upon the estate, but can only recover the debt from the heir personally to the extent of the assets descended. If the estate be subject to the charge, the heir takes not beneficially but only as trustee, and then there are no legal assets in consideration of equity, and the bond creditor may be enjoined from pursuing his legal right. And on these grounds it has been decided that specialty debts are not entitled to a preference (*r*).

Case of
trustee being
also executor.

4. It was also thought at one time, that if the estate [* 525] charged * with the debts was to be adminis-

(*m*) Greaves v. Powell, 2 Vern. 248; 302. Raithby's ed.; Bradgate v. Ridlington, Mose. 56; 1 Eq. Ca. Ab. 141, pl. 3; Walker v. Meager, 2 P. W. 550; Martin v. Hooper, Rep. t. Hardwicke, by Ridg. 299; Whitton v. Lloyd, 1 Ch. Ca. 275; Foly's case, 2 Freem. 49; Kidney v. Coussmaker, 12 Ves. 154, per Sir W. Grant; Peter v. Bruen, cited 2 P. W. 551; Lloyd v. Williams, 2 Atk. 111, per Lord Hardwicke.

(*n*) Wolestoncroft v. Long, 1 Ch. Ca. 32; Hamilton v. Houghton, 2 Bligh, 187, per Lord Eldon; Child v. Stephens, 1 Vern. 101.

(*o*) Wolestoncroft v. Long, 1 Ch. Ca. 32; Anon. 2 Ch. Ca. 54; &c.

(*p*) Anon. 2 Ch. Ca. 54.

(*q*) Fremout v. Dedire, 1 P. W. 429; Young v. Dennett, 2 Dick. 452; Blatch v. Wilder, 1 Atk. 420; Allan v. Heber, Str. 1270; S. C. 1 W. Bl. 22; and see Plunket v. Penson, 2 Atk. 290; Delany v. Delany, 15 L. R. Ir. 55.

(*r*) Shiphard v. Lutwidge, 8 Ves. 26; Pope v. Gwyn, cited Ib. 28, note; Bailey v. Ekins, 7 Ves. 319; Batson v. Lindgreen, 2 B. C. C. 94; Hargrave v. Tindal, cited Newton v. Bennet, 1 B. C. C. 136, note.

¹ McDermutt v. Strong, 4 Johns. Ch. 687; McMeekin v. Edmonds, 1 Hill, Eq. 293; Le Prince v. Guillemon 1 Rich. Eq. 220.

tered by the *executor*, the testator must have meant that the executor should, as in his executorial capacity, observe the *legal* priorities (s); however, there was no reason, in fact, why the characters of trustee and executor should not be united in the same person without confusion, and so it has since been determined (t). But where the trust was expressly to pay the settlor's debts "according to their priority, nature, and specialty," a bond debt with interest was payable before a simple contract debt (u). But now all debts of persons who may have died on or after 1st January, 1870, are payable *pari passu*.

5. If there be a remnant of *unclaimed dividends* left in the hands of the trustees, it does not belong to the trustees for their own benefit, but will be divisible amongst the unpaid creditors who do claim (v). Unclaimed dividends.

Thirdly, As to allowance of interest.

1. Whether the trust be created by deed (w), or will (x), and though the fund has been making interest (y), the trustees will not be justified in paying interest upon *simple contract debts* not carrying interest; and *à fortiori*, this is the case where interest is expressly directed as to some particular debts (z)¹. Interest not allowed on simple contract debts.
Where the trust was *by deed*, but the creditors had not been made parties, Lord Eldon observed, "The mere direction to pay a debt does not infer either contract or

(s) *Girling v. Lee*, 1 Vern. 63; *Cutterback v. Smith*, Prec. Ch. 127; *Bickham v. Freeman*, Ib. 136; *Masham v. Harding*, Bunb. 339; *Foly's case*, 2 Freem. 49; *Delany v. Delany*, 15 L. R. Ir. 55.

(t) *Prowse v. Abingdon*, 1 Atk. 482; *Newton v. Bennet*, 1 B. C. C. 135; *Silk v. Prime*, Ib. 138, note; *S. C. 1 Dick. 384*; *Lewin v. Okeley*, 2 Atk. 50; *Barker v. Boucher*, 1 B. C. C. 140, note.

(u) *Passingham v. Selby*, 2 Coll. 405.

(v) *Wild v. Banning*, 12 Jur. N. S. 464.

(w) *Hamilton v. Houghton*, 2 Bligh, 169, see 186; *Car v. Burlington*, 1 P. W. 228, as corrected in Cox's ed.; *Barwell v. Parker*, 2 Ves. 364; *Shirley v. Ferrers*, 1 B. C. C. 41; and see *Stewart v. Noble*, Vern. & Scriv. 536; *Creuze v. Hunter*, 2 Ves. jun. 165; *S. C. 4 B. C. C. 319*.

(x) *Lloyd v. Williams*, 2 Atk. 108; *Stewart v. Noble*, Vern. & Scriv. 528; *Dolman v. Pritman*, 3 Ch. Rep. 64; *Nels. 136*; *Freem. 133*; *Bath v. Bradford*, 2 Ves. 588, *per* Lord Hardwicke; and see *Tait v. Northwick*, 4 Ves. 816. *Bothomly v. Fairfax*, 1 P. W. 334, note; *Maxwell v. Wettenhall*, 2 P. W. 26, ed. by Cox, are overruled.

(y) *Shirley v. Ferrers*, 1 B. C. C. 41; but see *Pearce v. Slocombe*, 3 Y. & C. 84.

(z) *Jenkins v. Perry*, 3 Y. & C. 84.

¹ Debts which, as shown by the instrument proving them, must be paid with interest. *Bryant v. Russell*, 23 Pick. 508.

trust to pay interest upon debts by simple contract. As to *contract*, the creditors did not execute the deed, and there was nothing to prevent their suing the debtor after the execution; and no *consideration* was given to the debtor by charging the land and discharging the [* 526] person" (a). Even where the debts * did in their nature carry interest, and the direction in a will was to pay "the debts owing by the testatrix's brother at the time of his death," but forty years had elapsed since the death of the brother; so that the interest if allowed would have amounted to more than double the principal, the Court thought the direction could not have been intended to include interest as well as principal (b).

The trust deed does not make the debts specialties.

2. It was once suggested by Lord Abinger that "if a man execute a trust of a term for the benefit of his creditors, the deed makes them mortgagees *if they execute it*, and so gives them a right to interest" (c); and it was held in some old authorities, that even in a deed to which the creditors were not parties, or in a trust created by will for payment of debts, the creditors were to be regarded as mortgagees and were entitled to interest (d); but the doctrine in the latter cases has long since been overthrown, and it is apprehended that the distinction taken by the Chief Baron cannot at the present day be supported (e). Again, it was said by Lord Hardwicke that "if a man *by deed* in his life creates a trust for payment of his debts, annexes a schedule of some debts, and creates a trust term for the payment, as that is in the nature of a *specialty*, it will make these, though simple contract debts, carry interest" (f). But this dictum also is not in conformity with the law as now established and cannot be maintained (g).

Pearce v. Slocombe.

3. But where A. and B. assigned their *joint property* to C., D. and E. upon trust, in the first place to pay

(a) *Hamilton v. Houghton*, 2 Bligh, 189; and see *Barwell v. Parker*, 2 Ves. 364; *Bath v. Bradford*, Ib. 588.

(b) *Askew v. Thompson*, 4 K. & J. 620.

(c) *Jenkins v. Perry*, 3 Y. & C. 383.

(d) *Maxwell v. Wettenhall*, 2 P. W. 27; *Car v. Burlington*, 1 P. W. 229.

(e) *Barwell v. Parker*, 2 Ves. 364. It must be borne in mind, however, that the practice of the Court in the Chancery Division gives simple contract creditors a right to interest from the date of the decree out of any *surplus* assets after paying all debts, and the interest of such as by law carry interest; see Rules of Supreme Court, Ord. 55, R. 63.

(f) *Barwell v. Parker*, 2 Ves. 364.

(g) *Stone v. Van Heythuysen*, Kay, 721; *Clowes v. Waters*, 16 Jur. 632.

the *joint* debts at the expiration of a year from the date of the assignment, and then as to a moiety to pay the *separate* debts of A., and at the end of a year sufficient assets were realized to have discharged the joint debts, but the money, instead of being so applied, was invested in the funds and the interest accumulated, it was held, that as the fund applicable to the payment of the joint debts had been making interest from the time the debts should have been paid, the joint creditors, though on simple contract, were entitled to interest at 4 per cent. before the separate creditors were paid their principal. The separate creditors would otherwise try to impede the general * settlement, [* 527] in order that, in the meantime, they might enjoy the interest from the joint creditor's fund (*h*).

4. The creditors may stipulate for payment of interest, or the settlor, if so minded, may insert such a direction (*i*). But a trust for payment of specialty and simple contract debts and *all interest thereof*, will not amount to such a direction, but the words will be taken to have reference to the debts carrying interest of their own nature (*k*). Creditors may stipulate for interest.

5. *Specialty* debts, though actually released by a creditors' deed will carry interest up to the *time of payment*. It might be urged, indeed, that as regards specialty debts the amount of the debt is the principal and interest; and therefore in a trust for payment of debts interest as well as principal must be taken into calculation to ascertain what the debt is at the date of the deed or the death of the testator; but that interest ought not to run beyond the date of the trust deed or the death of the testator, for that principal and interest together are then regarded as one sum, not as a debt but the *claim* of a *cestui que trust*. And some principle of this kind appears to have been acted upon in the case of *Car v. Burlington* (*l*), where a person vested estates in trustees upon trust to pay all such debts as he should owe at his death, and the Court directed the Master to calculate interest on such of the debts as carried interest *up to the death of the settlor*; but the Master was not to carry on any interest on any security beyond the settlor's decease, but in case there were assets to pay the simple contract debts as well as Specialty debts.

(*h*) *Pearce v. Slocombe*, 3 Y. & C. 84.

(*i*) See *Bath v. Bradford*, 2 Ves. 588; *Barwell v. Parker*, *Ib.* 364; *Stewart v. Noble*, Vern. & Scriv. 536.

(*k*) *Tait v. Northwick*, 4 Ves. 816.

(*l*) 1 P. W. 228, as corrected in Cox's ed. from Reg. Lib.

the specialty debts, the question of ulterior interest was reserved. At the present day, however, the rule is to consider the specialty debt as subsisting up to the time of payment, *i. e.*, to calculate interest on *the principal* not only up to the date of the deed or the death of the testator, but up to the day of payment (*m*).

Bond creditors not entitled to interest beyond the penalty.

6. Bond creditors, it must be observed, will in no case be entitled to receive more for principal and interest than the amount of the penalty (*n*).

(*m*) Bateman *v.* Margerison, 16 Beav. 477.

(*n*) Hughes *v.* Wynne, 1 M. & K. 20; *Anon.* 1 Salk. 154; Clowes *v.* Waters, 16 Jur. 632.

THE DUTIES OF TRUSTEES OF CHARITIES.

1. CHARITIES may either be established by charter, as *eleemosynary corporations*, or may be placed under the management of *individual trustees*.

2. Before entering upon the duties of trustees for Charities by charities, it may be proper to introduce a few preliminary remarks upon the subject of the Court's (o) *jurisdiction* over charities established by charter.

3. On the institution of such a charity a *visitatorial* Visitor. jurisdiction arises of common right to the founder (whether the Crown or a private person), or to those whom the founder has substituted in the place of himself (p); and the office of visitor is *to hear and determine all differences of the members of the society amongst themselves, and generally to superintend the internal government of the body, and to see that all rules and orders of the corporation are observed* (q). The visitor must take as his guide the statutes originally propounded by the founder (r); but so long as he does not exceed his proper province, his decision is final, and cannot be questioned by way of appeal (s).

4. With this *visitatorial* power the Court has nothing to do; it is only as respects the administration of the corporate *property* that equity assumes to itself any right of interference (t). Jurisdiction of the Court over corporate bodies.

[(o) By 36 & 37 Vict. c. 66, s. 34, causes and matters for the execution of Charitable Trusts, are to be assigned to the Chancery Division of the High Court of Justice.]

(p) *Eden v. Foster*, 2 P. W. 326, resolved; Attorney-General v. Gaunt, 3 Sw. 148.

(q) See *Philips v. Bury*, Skin. 478; Attorney-General v. Crook, 1 Keen, 126; Attorney-General v. Archbishop of York, 2 R. & M. 468; *Re Birmingham School*, Gilb. Eq. Rep. 180, 181.

(r) *Green v. Rutherford*, 1 Ves. 469, per Sir J. Strange; Id. 472, per Lord Hardwicke.

(s) *St. John's College, Cambridge v. Todington*, 1 Burr. 200, per Lord Mansfield; Attorney-General v. Lock, 3 Atk. 165, per Lord Hardwicke; Attorney-General v. The Master of Catherine Hall, Cambridge, Jac. 392, per Lord Eldon.

(t) See the observations of Lord Commissioner Eyre in Attorney-General v. The Governors of the Foundling Hospital, 2 Ves. jun. 47. But Chief Baron Richards once observed, he had been

Informal
election.

Mal-adminis-
tration.

How pro-
perty newly
given is
affected by
the visita-
torial power.

[* 529] * 5. Upon the ground of this distinction between the visitatorial power and the management of the revenue, an information for the *removal of governors or other corporators*, as having been irregularly appointed, would be dismissed with costs (*u*); but whenever the administration of the *property* by the governors can be shown to have a tendency to pervert the end of the institution, the Court will immediately interpose, and put a stop to such wrongful application (*v*)¹.

6. An estate newly bestowed upon an old corporation is not to be regarded in the same light as property with which the charity was originally endowed. The visitatorial power is *forum domesticum*—the private jurisdiction of the founder; and the new gift will not be made subject to it, unless the will of the donor be either actually expressed to that effect, or is to be collected by necessary implication (*w*). If a legal or equitable interest be given to a body corporate, and *no special purpose* be declared, the donor has plainly implied that the estate shall be under the general statutes and rules of the society, and be regulated in the same manner as the rest of their property (*x*)²; but if a *particular and*

of counsel in the Foundling Hospital case, and he remembered some of the first men of the bar were not satisfied with the decision; *In re Chertsey Market*, 6 Price, 272. See also the observations of Lord Hardwicke in *Attorney-General v. Lock*, 3 Atk. 165; and see upon this subject generally *Ex parte Berkhamstead Free School*, 2 V. & B. 138; *The Poor of Chelmsford v. Mildmay*, Duke, 83; *Attorney-General v. Earl of Clarendon*, 17 Ves. 499; *Eden v. Foster*, 2 P. W. 326; *Attorney-General v. Dixie*, 13 Ves. 533, 539; *Attorney-General v. Corporation of Bedford*, 2 Ves. 505; 5 Sim. 578; *Attorney-General v. Browne's Hospital*, 17 Sim. 137; *Attorney-General v. Dedham School*, 23 Beav. 350; *Daugars v. Rivaz*, 28 Beav. 233.

(*u*) *Attorney-General v. Earl of Clarendon*, 17 Ves. 491, see 498; *Whiston v. Dean and Chapter of Rochester*, 7 Hare, 532; *Attorney-General v. Dixie*, 13 Ves. 519; *Attorney-General v. Middleton*, 2 Ves. 327, see 330; *Attorney-General v. Dulwich College*, 4 Beav. 255; *Attorney-General v. Magdalen College, Oxford*, 10 Beav. 402; *Attorney-General v. Corporation of Bedford*, Id. 505; *In re Bedford Charity*, 5 Sim. 578.

(*v*) See *Attorney-General v. St. Cross Hospital*, 17 Beav. 435; *Attorney-General v. The Governors of the Foundling Hospital*, 2 Ves. jun. 48; *Attorney-General v. Earl of Clarendon*, 17 Ves. 499.

(*w*) *Green v. Rutherford*, 1 Ves. sen. 472 *per* Lord Hardwicke.

(*x*) Id. 473, *per eundem*; *Ex parte Inge*, 2 R. & M. 596, *per* Lord Brougham; *Attorney-General v. Clare Hall*, 3 Atk. 675, *per* Lord Hardwicke.

¹ *Brunnenmeyer v. Buhre*, 32 Ill. 183; *Van Houten v. The Church*, 2 Green Ch. 137. The remedy is by bill or information to the Attorney-General or other person having the right to sue. See Perry on Trusts (3rd ed.) § 744.

² *Hadley v. Hopkins*, 14 Pick. 240.

special trust be annexed to the gift, *that* excludes the visitatorial power of the original founder; and the Court, viewing the corporation in the light of an ordinary trustee, will determine all the same questions as would have fallen under its jurisdiction had the administration of the fund been intrusted to the hands of individuals (*y*).

*7. Where a private person founds a char- [* 530] Private foundation with a charter. ity, and then the Crown grants a charter, the presumption is that the Crown meant to carry out the founder's intentions, and the jurisdiction of the Court which existed before will be continued (*z*).

8. Even the *visitatorial* power may, under particular circumstances and in a special manner, be exercised by the Lord Chancellor; for the Crown may be visitor by the terms of the foundation; and, if the heir of the founder cannot be discovered (*a*), or become a lunatic (*b*), the visitatorial power, rather than that the corporation should not be visited at all, will result to the Crown. And while in *civil* corporations the Crown is visitor through [the High Court of Justice (*c*)]; (for corporate bodies which respect the public policy of the country and the administration of justice, are necessarily better regulated under the superintendence of a Court of law:) yet, as regards *eleemosynary* corporations, the Crown's visitatorial power is committed to the Lord Chancellor, as in matters of charity the more appropriate supervisor (*d*). And the mode of application to the Lord Chancellor in these cases is by petition to the Great Seal (*e*).

(*y*) *Green v. Rutherford*, 1 Ves. sen. 462.

(*z*) *Attorney-General v. Dedham School*, 23 Beav. 350.

(*a*) *Ex parte Wrangham*, 2 Ves. jun. 609; *Attorney-General v. Earl of Clarendon*, 17 Ves. 498, *per* Sir W. Grant; *Attorney-General v. Black*, 11 Ves. 191; *Case of Queen's College, Cambridge*, Jac. 1.

(*b*) *Attorney-General v. Dixie*, 13 Ves. 519, see 533.

[(*c*) This visitatorial power was formerly exercised through the Court of Queen's Bench, but by 36 & 37 Vict. c. 66, the jurisdiction of Court of Queen's Bench was transferred to the High Court of Justice, and by s. 34 of that Act, matters which were formerly within the exclusive cognizance of the Court of Queen's Bench have been assigned to the Queen's Bench Division of the Court.]

(*d*) *King v. St. Catherine's Hall*, 4 T. R. 233, see 244; and see *Ex parte Wrangham*, 2 Ves. jun. 619. [By 36 and 37 Vict. c. 66, s. 17, the visitatorial jurisdiction of the Lord Chancellor is reserved to him and is not transferred to the High Court of Justice or the Court of Appeal.]

(*e*) See the cases cited in notes (*b*) and (*c*); and *Ex parte Inge*, 2 R. & M. 594; *Re Queen's College, Cambridge*, 5 Russ. 54; *Re University College, Oxford*, 2 Ph. 521.

We now proceed to the consideration of the *duties* of trustees of charities.

Fund must be applied to the charity prescribed.

9. It is of course imposed upon the trustees, whether individuals or a corporation, not to convert the charity fund to other uses than according to the intent of the founder or donor; so long as those uses are capable of execution (*f*). Thus if the gift be to find a preacher in Dale, it would be a breach of trust to provide one in Sale; if it be to find a preacher, it would be a breach [* 531] of trust to apply it * to the poor (*g*): if the trust be for the poor of O., it would be a breach of trust to extend it to other parishes (*h*): if the trust be to repair a chapel, the rents must not be mixed up with the poor-rate for parochial purposes (*i*): if a fund be raised for erecting a hospital, it cannot be diverted to lighting, paving, and cleansing the town (*k*).

Chapel for school.

10. A chapel was granted to the trustees of a *school* for the use and benefit of the said school, and though the inhabitants of the hamlet had been long accustomed to attend divine service in the chapel, it was held that, as the chapel was for the exclusive benefit of the school, the trustees had no power to apply the revenues of the charity towards enlarging the chapel for the better accommodation of the inhabitants (*l*).¹

Chapel pulled down.

11. The trustees for maintaining a *chapel* had pulled down the edifice, converted the burial ground to profane purposes, carried the bell to the market-place, put the pews in the parish church, and employed the stones of the chapel for repairing a bridge. Sir T. Plumer said, "It was an enormous breach of trust, and such as could not have been expected in a Christian country;" and directed an enquiry, what emoluments had come to the hands of the trustees on account of the breach of trust, and what would be the expense of restoring the chapel

(*f*) See Attorney-General *v.* Sherborne School, 18 Beav. 256; Attorney-General *v.* Calvert, 23 Beav. 248; Attorney-General *v.* Corporation of Rochester, 5 De G. M. & G. 797; *In re* Stafford Charities, 25 Beav. 28; Attorney-General *v.* Boucherett, 25 Beav. 116; Attorney-General *v.* Gould, 28 Beav. 485; Ward *v.* Hipwell, 3 Giff. 547.

(*g*) Duke, 116; Attorney-General *v.* Newbury Corporation, C. P. Coop. Cases, 1837-38, 72; Attorney-General *v.* Goldsmiths' Company, *Ib.* 292; and see *Wivéscom* case, Duke, 94.

(*h*) Attorney-General *v.* Brandreth, 1 Y. & C. C. C. 200.

(*i*) Attorney-General *v.* Vivian, 1 Russ. 226, see 237.

(*k*) Attorney-General *v.* Kell, 2 Beav. 575.

(*l*) Attorney-General *v.* Earl of Mansfield, 2 Russ. 501.

¹ See Attorney-General *v.* Federal Street Meeting House, 3 Gray 1.

to the state in which it stood at the time of its destruction (*m*).

12. A fund in aid and relief of "*poor citizens* who often were grievously burdened by the imposts and taxes of the city" was held not to be applicable to the payment of rates and other expenses of the city that would otherwise have been raised by public levies and impositions; nor to be distributable to such of the poor as received parish relief, for that would be so much in aid of the ratepayers; but ought to have been administered for the exclusive benefit of the poor (*n*). Charity in aid of rates.

13. Where a trust is created for the "*poor of a parish*," it was for a long time doubted what class of persons was entitled to the benefit. Lord Eldon thought, that the fund should be administered * without [* 532] reference to parochial relief; for assistance might be given to a pauper without exonerating the rich from their usual contribution to the rates—to the relief, which the law had provided, further relief might be added, which the parish was not bound to afford (*o*): besides, the appropriation of the fund to the poor not in receipt of parochial relief might still have the effect of conferring a benefit on the rich; for persons who could not otherwise have maintained themselves might, by means of the charity, be prevented from seeking assistance from the rate (*p*). However, it has been determined in several cases, and seems, therefore, to be now settled, that the charity must be confined to those *not in receipt of parochial relief* (*q*).¹ Poor of a parish.

(*m*) *Ex parte Greenhouse*, 1 Mad. 92; reversed on technical grounds, 1 Bligh, N. S. 17.

(*n*) *Attorney-General v. Corporation of Exeter*, 2 Russ. 45; S. C. 3 Russ. 395; and see *Attorney-General v. Wilkinson*, 1 Beav. 372; *Attorney-General v. Bovill*, 1 Ph. 762; *Attorney-General v. Blizard*, 21 Beav. 233.

(*o*) *Attorney-General v. Corporation of Exeter*, 2 Russ. 51—54.

(*p*) See S. C. 3 Russ. 397.

(*q*) *Attorney-General v. Corporation of Exeter*, 2 Russ. 47; S. C. 3 Russ. 359; *Attorney-General v. Wilkinson*, 1 Beav. 372; *Attorney-General v. Bovill*, M. R. 1 July, 1839. But see *Attorney-General v. Bovill*, 1 Ph. 768, where Lord Cottenham is reported to have said, "I am inclined to think that the right course is, to administer the charity, and leave to chance to what extent it may operate to the relief of the poor-rates." The decree, however, seems in the main to be in accordance with the previous decisions; and see *Attorney-General v. Blizard*, 21 Beav. 233.

¹ As to *parish property*; by the effect of the decisions on 59 Geo. 3, c. 12, s. 17, all hereditaments belonging to the parish at the time of the Act, or subsequently acquired, whether for a chattel (*Alderman v. Neate*, 4 M. & W. 704) or freehold interest, and though originally conveyed to express trustees for parish 59 G. 3, c. 12.

Trust for
maintaining
"the worship
of God."

[* 533] * 14. If land or money be given for maintaining "*the worship of God*" (r), or the promotion of "*Godly learning*" (s), and nothing more is said, the Court will execute the trust in favour of the established form of religion; and dissenters cannot be appointed trustees (t). But though the *trustees* of a Church of England school must be members of the Established Church, it does not follow that the children of dissenters are not to be admitted into the *school*, or even that the *master* may not be a dissenter, though the latter appointment could only be justified by peculiar circumstances (u). If it be clearly expressed upon the deed or will that the purpose of the settlor is to promote the maintenance of

(r) Attorney-General v. Pearson, 3 Mer. 409.

(s) *Re Ilminster School*, 2 De G. & J. 535.

(t) *Re Stafford Charities*, 25 Beav. 28; *Re Ilminster School*, 2 De G. & J. 535; S. C. *nom. Baker v. Lee*, in D. P. 8 H. L. Cas. 495; Attorney-General v. Clifton, 32 Beav. 596.

(u) Attorney-General v. Clifton, 32 Beav. 596.

purposes, if it be unknown or uncertain in whom the legal estate is vested (*Doe v. Hiley*, 10 B. & C. 885; and see *Churchwardens of Deptford v. Sketchley*, 8 Q. B. 394), or generally where it is unascertained in whom the legal estate is outstanding, but the parish have exercised all the rights of ownership, and the property belongs to them in the popular sense (*Doe v. Terry*, 4 Ad. & Ell. 274; *Doe v. Cockell*, *Ib.* 478), are now transferred to the churchwardens and overseers of the parish, not indeed as a corporation and having a common seal (*Ex parte Annesley*, 2 Y. & C. 350), but as a persons taking, by parliamentary succession, in the nature of a corporation (*Smith v. Adkins*, 8 M. & W. 362).

The Act does not extend to *copyholds* (*Attorney-General v. Lewin*, 8 Sim. 366; *In re Paddington Charities*, *Ib.* 629), nor to freeholds of which the trusts are not exclusively for the parish, but also embrace other objects (*Allason v. Stark*, 9 Ad. & Ell. 255; *Attorney-General v. Lewin*, 8 Sim. 366; *In re Paddington Charities*, *Ib.* 629); nor to lands vested in existing trustees, and who are actually in discharge of their duties in that character (*Churchwardens of Deptford v. Sketchley*, 8 Q. B. 394, overruling *Rumball v. Munt*, *Ib.* 382; and see *Gouldsworth v. Knight*, 11 M. & W. 337). However, though *all* the trusts must be for the parish they may be directed to some special trust, if exclusively parochial, as a trust for aiding the church-rates (*Doe v. Hiley*, 10 B. & C. 855; *Doe v. Terry*, 4 Ad. & Ell. 274; and see *Allason v. Stark*, 9 Ad. & Ell. 266, 267; *Doe v. Cockell*, 4 Ad. & Ell. 478), or furnishing a poor-house (*Alderman v. Neate*, 4 M. & W. 704), or for the relief of the poor of the parish, whether the objects of the charity be or be not held to include those in receipt of parochial relief; for if non-recipients only of parochial relief are to be admitted, the parish is still benefited by keeping that class of poor, by means of the charity, off the parish books (*Ex parte Annesley*, 2 Y. & C. 350; *Churchwardens of Deptford v. Sketchley*, 8 Q. B. 394).

dissenting doctrines, the Court, provided such doctrines be not contrary to law, will execute the intention (*v*).

15. Where a fund has been raised for the purpose of founding a chapel or any other charity, and the contributors were so numerous as to preclude the possibility of their all concurring in any instrument declaring the trust, and a declaration of trust was made by the persons in whom the property was vested at or about the time when the sums were raised, that declaration may reasonably be taken *prima facie* as a correct exposition of the minds of the contributors (*w*)¹.

Numerous contributors.

16. Where an institution exists for the purpose of religious worship, and it cannot be discovered from the instrument declaring the trust what form or species of religious worship was in the intention of the settlors, the Court will then inquire what has been the *usage* of the congregation; and, if such usage do not contravene public policy, will be guided by it as evidence of the intention in the administration of the trust. And by 7 & 8 Vict. c. 45, s. 2, if the instrument of trust do not in express terms, or by reference to some book or other document, define the religious doctrines, twenty-five years' usage immediately preceding any suit is made conclusive evidence thereof (*x*). But if the purpose of the settlors appear clearly upon the instrument, the Court, in that case, though the usage of the congregation may have a run in a different channel, * cannot change the nature of the original in- [*534] stitution: it is not competent for the majority of the congregation, or for the managers of the property, to say, "We have altered our opinions: the chapel in future shall be for the benefit of persons of the same persuasion as ourselves" (*y*)².

The trust originally intended will be preserved.

(*v*) Attorney-General *v.* Pearson, 3 Mer. 409, *per* Lord Eldon; see S. C. 7 Sim. 290.

(*w*) Attorney-General *v.* Clapham, 4 De G. M. & G. 626.

(*x*) See Attorney-General *v.* Hutton, Drur. 530. As to Roman Catholic Charities, see 23 & 24 Vict. c. 134, s. 5.

(*y*) Attorney-General *v.* Pearson, 3 Mer. 400, *per* Lord Eldon; *Foley v. Wontner*, 2 J. & W. 247, *per eundem*; *Craigdallie v. Aikman*, 1 Dow's P. C. 1; *Milligan v. Mitchell*, 3 M. & Cr. 73; *Broom v. Summers*, 11 Sim. 353; Attorney-General *v.* Murdoch, 7 Hare, 445; 1 De G. M. & G. 86; Attorney-General *v.* Munro, 2 De G. &

¹ The declaration of one of the contributors in such a case has been held a *prima facie* declaration of the purpose of the trust. *Newmyer's App.* 72 Pa. St. 121.

² *Howe v. School District*, 43 Vt. 282; *Meeting Street Bap. Soc. v. Hail*, 8 R. I. 241. As to the effect of an alteration of long standing in the faith and usage of a congregation, see Attorney-General *v.* Federal Street Meeting House, 3 Gray 1.

Appoint-
ment of new
trustees.

Notices.

Minister of a
meeting-
house.

17. If the deed of endowment neither provide for the succession of *trustees* nor the election of the *minister*, an inquiry will be directed, who, according to the nature of the establishment, are entitled to propose trustees, and to elect the minister (*z*); and if the election of the minister properly belong to the congregation, the majority is for that purpose the congregation (*a*). The appointment of the minister cannot, in such a case, belong to the heir of the surviving trustee, who may not be of the same persuasion, but, it might happen, a Roman Catholic or Jew (*b*). For the valid election of a minister due notice of the meeting for the purpose must be given, and no person must take part in the proceedings who are not entitled to attend (*c*).

18. A minister in possession of a meeting-house is tenant at will to the trustees, and his estate is determinable by demand of possession without any previous notice (*d*). But this merely tries the *legal* right without affecting the question whether in *equity* the minister was properly deprived (*e*), and if the minister be in possession, and preaching the doctrines that were intended by the founders, it is the practice of a Court of Equity to continue him until the case can be heard, whether he was duly elected or not (for the first point is to have the service performed), and the Court will pay him his salary (*f*). If a minister be removable by the decision of the congregation regularly convened [* 535] at a meeting, * the charges intended to be brought against the minister must be specified in the notice calling the meeting, and the minister himself must be apprised of the nature of the charges (*g*).

Sm. 122; Attorney-General v. Corporation of Rochester, 5 De G. M. & G. 797.

(*z*) Davis v. Jenkins, 3 V. & B. 151, see 159; and see Leslie v. Birnie, 2 Russ. 114. The 13 & 14 Vict. c. 28, seems to confer a power of appointing new trustees, for the *special purposes of that Act*, where there is no power or the power has lapsed.

(*a*) Davis v. Jenkins, 3 V. & B. 155; and see Leslie v. Birnie, 2 Russ. 114.

(*b*) Davis v. Jenkins, 3 V. & B. 155.

(*c*) Perry v. Shipway, 4 De G. & J. 353, see 360.

(*d*) Doe v. Jones, 10 B. & C. 718; Doe v. M'Kaeg, 10 B. & C. 721; Perry v. Shipway, 1 Giff. 10; and see Brown v. Dawson, 12 Ad. & Ell. 624. See *post* p. 537.

(*e*) See Doe v. Jones, 10 B. & C. 721.

(*f*) Foley v. Wontner, 2 J. & W. 247, *per* Lord Eldon. By 32 & 33 Vict. c. 110, s. 15, the powers of the Charity Commissioners, as to the appointment and removal of trustees, are extended to "buildings registered as places of meeting for religious worship."

(*g*) Dean v. Bennett, 6 L. R. Ch. App. 489.

19. It is the policy of the Established Church by Minister may giving the minister an estate for life in his office to be removable render him in some degree independent of the congregation ; but if it be the usage amongst any particular class of dissenters to appoint their ministers for limited periods, or to make them removable at pleasure, though a Court of Equity might not struggle hard in support of such a plan, there is no principle upon which the Court would not be bound to give it effect (*h*). And, accordingly, where a decided majority of the congregation passed a resolution for the removal of their pastor, the Court granted an injunction against his officiating (*i*)¹.

20. To every corporation there belongs of common right the power of establishing *bye-laws* for the government of their own body ; but this privilege cannot authorize the enactment of any rules or regulations that would tend to pervert or destroy the directions of the original founder and the objects of the charity (*k*)². And so a clause in a deed investing the trustees, or the major part of them, with the power of making orders from time to time upon matters relating to a meeting-house would not enable them to convert the meeting-house, whenever they thought proper, into a meeting-house of a different description, and for teaching different doctrines from those of the persons who founded it, and by whom it was to be attended (*l*).

21. It is not the custom of the Court to remove objects of a charity who have been elected under a *mistake*, where the election was *bonâ fide* and without any fraud or corruption (*m*). Mistake.

22. The charity funds cannot be diverted into a *different* channel without the authority of Parliament (*n*), Act of Parliament necessary for the purpose of changing the trust.

(*h*) Attorney-General v. Pearsons, 3 Mer. 402, 403, *per* Lord Eldon.

(*i*) Cooper v. Gordon, 8 L. R. Eq. 249.

(*k*) Eden v. Foster, 2 P. W. 327, resolved.

(*l*) Attorney-General v. Pearson, 3 Mer. 411, *per* Lord Eldon.

(*m*) *Re Storie's University Gift*, 2 De G. F. & J. 529, see 531, 540.

(*n*) Attorney-General v. Market Bosworth School, 35 Beav. 305.

¹Owing to the peculiar nature of church edifices throughout the United States, (for they are generally owned and controlled by the church society or corporation or by its trustees and are not *free* and *open*, as those words are used with reference to a public charity), the funds raised to build or maintain them are not funds for charitable uses in the legal sense. The Attorney-General, therefore, can seldom interfere to prevent an alleged misuse of the building. Dublin case 38, N. H. 459, see Perry on Trusts (3rd ed.) § 732.

²Field v. Girard College, 54 Pa. St. 233.

either directly by a special Act or indirectly through the Charity Commissioners, who are now empowered to approve, provisionally, of a scheme varying from the original endowment, with a view to submit it to Parliament for its sanction (o).

Expenses of
an Act.

23. Formerly trustees, before applying to the legislature, [* 536] were in * the habit of procuring the sanction of the Court of Chancery for their greater security ; for if they took such a step upon the mere suggestion of their own minds, and failed in obtaining the contemplated Act, they were not allowed the costs and expenses incurred in the proceeding (p), but if the application to Parliament was attended with success, the trustees were then allowed their costs, though the sanction of the Lord Chancellor had not been previously obtained ; for the Court could not with propriety pronounce those measures to be imprudent which the legislature itself had enacted as prudent (q).

Letter may
be broken
and yet the
spirit pre-
served.

Free gram-
mar school.

24. The management of the trust may contravene the letter of the founder's will, and yet on a favourable construction, be conformable to the intention.

It was the opinion of Lord Eldon (r) and Sir T. Plumer (s), that if the wish of the founder was to establish a *free grammar school*, the Chancellor, though he felt perfectly convinced that a free grammar school (that is, a school for teaching the learned languages) could be of little or no use, would yet be bound to apply the revenue as the donor had directed, and could not substitute a school for teaching English and writing and arithmetic. But it has since been held by Lord Lyndhurst (t), Sir John Leach (u), Lord Langdale (v), and Lord Cottenham (w), that the Court has jurisdiction to extend the application of the charity fund to purposes beyond the *literal* intention, and that *writing and arithmetic* may be well introduced into a

(o) 16 & 17 Vict. c. 137, ss. 54—60. [And see 37 & 38 Vict. c. 87, which transfers the powers of the late Endowed Schools Commissioners to the Charity Commissioners.]

(p) Attorney-General v. Earl of Mansfield, 2 Russ. 519, *per* Lord Eldon.

(q) *Ib.* *per eundem*.

(r) Attorney-General v. Whiteley, 11 Ves. 241; Attorney-General v. Earl of Mansfield, 2 Russ. 501.

(s) Attorney-General v. Dean of Christchurch, Jac. 474.

(t) Attorney-General v. Haberdasher's Company, 3 Russ. 530.

(u) Attorney-General v. Dixie, 2 M. & K. 432; Attorney-General v. Gascoigne, Id. 652.

(v) Attorney-General v. Caius College, 2 Keen, 150; Attorney-General v. Ladyman, C. P. Coop. Cases, 1737—38, 180.

(w) Attorney-General v. Stamford, 1 Ph. 475.

scheme for the establishment or better regulation of a free grammar school. And this may of course be done in the case not of a *free grammar school*, but of a *free school* (x).

By 3 & 4 Vict. c. 77, the system of education in any *grammar school* is extended to other useful branches of literature and science, in addition to or in lieu of the Greek and Latin languages, or such other instruction as may be required by the terms of the foundation, or the existing statutes.

25. By the endowed Schools Act, 1869, (32 & 33 Vict. c. 56), * the Commissioners appointed by [* 537] Her Majesty to inquire into Schools were empowered by sect. 9, "in such manner as might render any educational endowment most conducive to the advancement of education, to *alter* and *add* to any existing, and to make any *new* trusts, directions, and provisions in lieu of any existing trusts, directions, and provisions." But by sect. 14, the Act was not to apply to charities created less than fifty years before the commencement of the Act, unless the governing body of the endowment assented to the new scheme. By 37 & 38 Vict. 87, the powers of the Endowed Schools Commissioners have been transferred to the Charity Commissioners, and certain amendments of the law have been introduced.

[26. By the City of London Parochial Charities Act, 1883 (y), the Charity Commissioners are empowered "to inquire into the nature, tenure, and value of all the property and endowments" of certain parochial charities of the City of London, and to prepare schemes for "the future application and management of the charity property and endowments." But by sect. 21, no scheme is to affect any endowment originally given to charitable uses less than fifty years before the commencement of the Act unless the governing body assent to the scheme. By sect. 39, power is given to the Commissioners to direct the sale of any part of the charity property upon such terms and conditions, and to such purchasers, as they may think fit; and the trustees for the time being of such property are thereupon to effect such sale. By sect. 48, a new corporate governing body to be called "The Trustees of the London Parochial Charities" is to be established, with perpetual succession and a common seal.]

27. A schoolmaster or other officer of the trustees, whose appointment has been cancelled or whose office

Ejectment of person ceasing to be school-master.

(x) Attorney-General v. Jackson, 2 Keen, 541.

[(y) 46 & 47 Vict. c. 36.]

has otherwise ceased, and who in defiance of the trustees continues to hold over the premises given up to him, cannot, as he was lawfully put in possession, be treated on the footing of a trespasser on another's lawful possession, so as to be removable with as little force as may be necessary; but can be ejected in a summary way by application to two justices of the peace under the provisions of 23 & 24 Vict. c. 136, s. 13.

"Finding a master."

28. Where the trustees were directed to apply the rents "towards the necessary *finding a master*, and for the pains of such master," and the trustees applied part of the revenue towards *rebuilding and repairing* the school-room and school-house, it was held to be a good execution of the trust, because a school-room and [* 538] house * were necessary, and if these were not provided by the trustees they must have been provided by the master himself, and so it was in effect applied for the pains of the master (z).

"Relief of poor."

29. So a trust "for the *relief of the poor*" has been construed to authorize an application of the funds to the building of a *school-house*, and the *education of the poor* of the parish (a).

Repairing and rebuilding.

30. So where an estate had been given to trustees for the *repair* of a church and chapel of ease thereto belonging, and the parish had taken down the chapel to erect a new one on a different site, it was determined that the trustees had not exceeded the line of their duty in expending the accumulated rents upon the *rebuilding* of the chapel; but it was held that the *rents* only, and not the *corpus* of the estate, could be so applied; and the Court had great doubt whether anything could be laid out upon the *fitting-up* of the chapel (b). But where there was a large surplus fund and the objects of the charity were sufficiently provided for, the Court in a special case made repairs and improvements out of the *capital*, without any direction for recouping the capital out of the income (c),

Augmentation of salaries.

31. Where the direction of the founder was that the master of a school should receive 50*l.* a year, and the usher 30*l.*, and the trustees had raised the salaries respectively to 80*l.* and 60*l.*, as the will did not contain any prohibition against increasing the salaries, and it could not be supposed that the trustees were not under any circumstances to alter the amount, the Court re-

(z) Attorney-General v. Mayor of Stamford, 2 Sw. 592.

(a) Wilkinson v. Malin, 2 Tyr. 544, see 570.

(b) Attorney-General v. Foyster, 1 Anst. 116. See *post* p. 575.

(c) *Re Willenhall Chapel*, 2 Dr. & Sm. 467.

fused to compel the trustees to refund the augmentation (*d*).

32. And, *vice versa*, if a fund be given, not for the Reduction of purposes of individual benefit, but for the discharge of salaries. certain duties, as for the support of a schoolmaster, and the fund increases to such an extent as to yield more than a reasonable compensation for the duties to be performed, the Court will not allow the surplus to be expended unnecessarily, but will order it to be applied for the promotion of some other charitable purpose (*e*).

33. Legacies had been left by several different testa- Loans. tors (between the years 1545 and 1666) for the purpose of being lent out in sums varying from 5*l.* to 200*l.* without interest; and Sir J. Leach was of opinion, that, regard being had to the alteration in the value of * money, it was not inconsistent with the in- [* 539] tention of the testators to raise the loans to sums varying from 100*l.* to 500*l.* (*f*).

34. Where the trust was to elect children, who or "Parishion- whose parents were *parishioners* of a certain parish, to ers." Christ's Hospital, it was held by V. C. Malins that the word "*parishioner*" must be taken in an honest and *bonâ fide* sense, and could not be applied to a person who had taken a small house temporarily for the mere purpose of obtaining a qualification, and had been rated to the parish collusively, and that where a disqualified candidate was elected after notice to the electors of such disqualification, the votes were thrown away, and that the opposing candidate, though he had a minority of votes, was duly elected (*g*). But on appeal Lord Justice James observed, that if the law allowed a man to be qualified, he was qualified however his qualification might have been gained—that men constantly acquired qualifications for voting in counties by buying a 40*s.* freehold for the sole purpose of giving themselves votes, and the decree of the Court below was reversed (*h*).

35. It need scarcely be remarked that a trustee would Retainer of be guilty of a gross breach of trust, should he keep the the charity fund.

(*d*) Attorney-General *v.* Dean of Christchurch, 2 Russ. 321.

(*e*) Attorney-General *v.* Master of Brentwood School, 1 M. & K. 376, 394.

(*f*) Attorney-General *v.* Mercers' Company, 2 M. & K. 654; and see Attorney-General *v.* Holland, 2 Y. & C. 683; Morden College case, cited *Ib.* 701, 702.

(*g*) *Etherington v. Wilson*, 20 L. R. Eq. 606.

(*h*) 1 Ch. D. 160.

charity fund in his hands, and not apply it, as it becomes payable, to the objects of the trust (*i*).

Alienation of
the charity
estate.

36. Trustees of charities could not as a general rule, even before the restrictions recently imposed, have made an absolute disposition of the charity estate; they could not, for instance, have parted with *lands* to a purchaser, and have substituted instead the reservation of a *rent* (*k*). And as the trustees could not have aliened absolutely, so they could not have accomplished the same end indirectly by demising for long terms of years as for 999 years (*l*); or for terms of ordinary duration, which covenants for perpetual renewal; (*m*); or by granting reversionary terms (*n*).

Where allow-
able.

37. But there was no positive rule that in *no* instance could an absolute disposition be made, for then the Court itself could not have authorized such an act—a [* 540] jurisdiction which, it is * acknowledged, has from time to time been exercised in special cases. "I do not doubt," observed Sir J. Wigram, "the existence of this power in the Court; the trustees have the power to sell at law, they can convey the legal estate, but it is only a Court of equity that can recall the property, and if that Court should sanction a sale it would be bound to protect the purchaser" (*o*). The true principle was, that an absolute disposition was then only to be considered a breach of trust when the proceeding was inconsistent with a provident administration of the estate for the benefit of the charity (*p*). And the transaction was strongly assumed to be improvident as against a purchaser until he had established the contrary (*q*).

(*i*) Duke, 116.

(*k*) Attorney-General v. Kerr, 2 Beav. 420; Blackston v. Hensworth Hospital, Duke, 49; Attorney-General v. Brettingham, 3 Beav. 91; and see Attorney-General v. Buller, Jac. 412; Attorney-General v. Magdalen College, 18 Beav. 223.

(*l*) Attorney-General v. Green, 6 Ves. 452; Attorney-General v. Pargeter, 6 Beav. 150.

(*m*) Lydiatt v. Foach, 2 Vern. 410; Attorney-General v. Brooke, 18 Ves. 326.

(*n*) See Attorney-General v. Kerr, 2 Beav. 420.

(*o*) Attorney-General v. Mayor of Newark, 1 Hare, 400; and see *Re Ashton Charity*, 22 Beav. 288; Anon. case, cited Attorney-General v. Warren, 2 S. W. 300, 302.

(*p*) See Attorney-General v. Warren, 2 Swans. 302; S. C. Wils. 411; Attorney-General v. Hungerford, 8 Bl. 437; S. C. 2 Cl. & Fin. 357; Attorney-General v. Kerr, 2 Beav. 428; Attorney-General v. South Sea Company, 4 Beav. 543; Attorney-General v. Newark, 1 Hare, 395; Parke's Charity, 12 Sim. 329; *Re Suir Island Female Charity School*, 3 Jon. & Lat. 171.

(*q*) Attorney-General v. Brettingham, 3 Beav. 91.

38. Now under the provisions of the recent Acts the Commissioners of Charities are empowered on application made to them to authorize the *sale* or *exchange* of any part of the charity property (*r*), and the trustees are restricted from any sale, mortgage or charge, *without the consent* of the Commissioners (*s*). But this does not interfere with the powers of trustees of charities to sell under *railway* and other *public Acts*, where the legislature has made proper provision for the due application of the purchase monies (*t*),

Recent charity Acts.

Sale of railway companies.

39. By another Act, "a majority of two-thirds of the trustees of any charity assembled at a meeting of their body duly constituted, and *having power to determine on any sale, exchange, partition, mortgage, lease, or other disposition* of any property of the charity," are empowered to pass the *legal estate* for giving effect to such disposition (*u*).

Power of trustees to pass the legal estate.

40. Where a sale or exchange is effected under the Charity Acts, the purchase or exchange monies may be laid out with the consent of the Commissioners in the purchase of other lands *without a license* * in [* 541] *mortmain* (*v*). But the Act is silent as to the requirement of 9 G. 2, c. 36, and the conveyance should therefore be by deed indented attested by two witnesses, and inrolled in Chancery within six calendar months (*w*).

Re-investment of sale monies.

41. Where there are *accumulations* from a charity estate, the Court, considering the purchase of *land* with personal estate belonging to charity to be opposed to the general policy of 9 G. 2, c. 36, will not as a general rule sanction such an investment (*x*). But there is nothing *illegal* in such an investment, if accompanied with the formalities required by the Mortmain Act; and therefore should a highly beneficial purchase offer itself, the

Investment of accumulations in land.

(*r*) 16 & 17 Vict. c. 137, s. 24; 18 & 19 Vict. c. 124, s. 32; see 23 & 24 Vict. c. 136, s. 16. The 16 & 17 Vict. c. 137, s. 21, authorizes improvements with the sanction of the Charity Commissioners; and the 23 & 24 Vict. c. 136, s. 15, authorizes the application of charity monies to "any other purpose or object" which the Commissioners may think beneficial, and which is not inconsistent with the foundation.

(*s*) 18 & 19 Vict. c. 124, s. 29. [The power of the Commissioners to authorize a sale of land falling under the provisions of the Allotments Extension Act, 1882 (45 & 46 Vict. c. 80), is not affected by that Act, *Parish of Sutton to Church*, 26 Ch. D. 173.]

(*t*) See the language of 18 & 19 Vict. c. 124, s. 29.

(*u*) 23 & 24 Vict. c. 136, s. 16; and see the still later enactment of 32 & 33 Vict. c. 110, s. 12, *post*, p. 547.

(*v*) 18 & 19 Vict. c. 124, s. 35.

(*w*) As to these requirements, see *ante*, p. 96.

(*x*) *Attorney-General v. Wilson*, 2 Keen, 680.

Inrolment.

trustees themselves would, it is conceived, run no risk in so investing the accumulations (*y*). Indeed the Court itself has made such orders where the purchase of the land was not the main object, but incidental to a general scheme as for the enlargement of a school (*z*). But in every case where land *comes into mortmain for the first time*, the conveyance must be by indenture sealed and delivered in the presence of two credible witnesses, and inrolled within six calendar months from the execution (*a*). Even where the land of a charity, whether vested in the corporation or in trustees, is taken by a public company, and the purchase-money is laid out under the direction of the Court in the purchase of other lands upon the like trusts, the deed must be *inrolled (b)*.

Loans of charity money on mortgage.

42. Trustees of a charity may lend the trust fund upon a *mortgage* of real estate, though a legal condition is expressly reserved, and though after default an equity of redemption arises by the rules of equity. The Statute of Mortmain (9 Geo. 2, c. 36) which avoids conveyances to a charity containing any reservation or condition for the benefit of the grantor, is held not to apply to such a case (*c*). But of course care should be taken that the mortgage is by indenture attested by two witnesses, and inrolled. The Court itself on one occasion, when its attention had been directed to the question, authorized the trustees of a charity to lend on mortgage (*d*).

33 & 34 Vict.
c. 34.

[* 542] * 43. Now by 33 & 34 Vict. 34, corporations and trustees holding monies in trust for any *public or charitable purpose*, may invest them on any real security authorized by, or consistent with, the trust, and the requirements of the Mortmain Act are dispensed with. But upon foreclosure or release of the equity of redemption, the land is to be held upon trust to be converted into money, and to be sold accordingly.

[Church trustees.]

[44. By the compulsory Church Rate Abolition Act, 1868, a body of trustees may be appointed in any parish for the purpose of accepting by bequest, donation,

(*y*) See *Vaughan v. Farrer*, 2 Ves. 188.

(*z*) *Attorney-General v. Mansfield*, 14 Sim. 601; *Honnor's Trust*, V. C. Kindersley, May 3, 1853.

(*a*) But see *Attorney-General v. Day*, 1 Ves. sen. 222. As to purchases before 25 July, 1828, see 9 G. 4, c. 85.

(*b*) *Re Christ's Hospital*, V. C. Wood, 12 W. R. 669.

(*c*) *Doe d. Graham v. Hawkins*, 2 Q. B. 212.

(*d*) *Attorney-General v. Gibson, Ex parte Lushington, Re Lady Prior's Charity*, July 21, 1853, M. R. The mortgage was for 50,000*l.* upon an estate in Northamptonshire.

contract or otherwise, and of holding any contributions which may be given to them for ecclesiastical purposes in the parish. The trustees are to consist of the incumbent and two house-holders or owners or occupiers of land in the parish, one to be chosen by the patron and the other by the Bishop of the diocese; and the trustees so appointed are to be a body corporate with perpetual succession and a common seal (e).]

45. Trustees of charities cannot grant leases to or in trust for *one of themselves*, for no trustee can be a tenant to himself, and the Court will charge him with an occupation rack-rent (f). Where two trustees were expressly authorized by the will to grant a lease to themselves, or either of them, with the consent of the tenant for life, and one of them took a lease with such consent accordingly, which was fair and proper, but it was found in effect that the relative characters of trustee and lessee were inconsistent; and led to inconveniences, the Court removed the trustee at the instance of the *cestuis que trust*, on the ground of the repugnant characters in this particular case of trustee and tenant; and though the trustee offered to surrender the lease, the Court, as it was beneficial to the *cestuis que trust*, held him to it, and dismissed him from the trust (g). Lease to a trustee.

46. Trustees should be cautious how they grant leases to their own *relations*, for that circumstance is calculated to excite a suspicion, which, if confirmed by any other fact, it might require a strong case to remove (h). Relations.

47. So a lease should not contain any covenant for the private advantage of the trustee; as where a corporation directed the insertion of a covenant that the lessee should grind at the corporation * mill, [* 543] in a suit for the establishment of the charity the corporation were, for this instance of misbehaviour, disallowed their costs (i).

48. Where trustees have a power given to them in general terms to grant leases, it is said that they may take *fin*es or reserve *rents* as, according to the circumstances of the case, may be most beneficial to the charity (k). If the trust estate held on lease increase Fines or rack-rent.

[(e) 31 & 32 Vict. c. 109, s. 9.]

(f) Attorney-General v. Dixie, 13 Ves. 519, see 534; Attorney-General v. Earl of Clarendon, 17 Ves. 491, see 500.

(g) *Passingham v. Sherborn*, 9 Beav. 424.

(h) *Ferraby v. Hobson*, 2 Ph. 261, *per* Lord Cottenham; and see *Ex parte Skinner*, 2 Mer. 457.

(i) Attorney-General v. Mayor of Stamford, 2 Sw. 592, 593.

(k) Attorney-General v. Mayor of Stamford, 2 Sw. 592. See now p. 546, *infra*.

in value upon the outlay of the *tenant*, the trustee is not called upon immediately to raise the tenant's rent, for such a practice would obviously prevent any improvement of the property (*l*). Nor if the value of the estate increase from the rise of agricultural produce will the trustee be personally liable, because he neglects for a few months to raise the rent; but if he wilfully continues the old rent when clearly a much higher rent can be obtained, he may be held responsible (*m*).

Adequate
considera-
tion.

49. In granting leases of charity lands care must be taken that the lease be for an adequate consideration, and if this be not observed, the Court will interfere and order the lease to be cancelled, and with the lease will also cancel the covenants (*n*).

Lease at an
under-value.

50. The lease may be annulled on the mere ground of *under-value* (*o*); but it must be an under-value satisfactorily proved and considerable in amount: it is not enough to show that a little more might have been got for the estate than has been actually obtained; still less is it sufficient to infer the under-letting from the value of the property at some subsequent period. (*p*).

"Rent not to
be raised."

51. Even where it was ordained at the creation of the trust, that no lease should be made for above twenty-one years, and the *rent should not be raised*, it was held that the trustee would not be justified in granting leases from time to time at no more than the original reservation: that as the times alter and the price of provisions rises, the rent ought to be raised in proportion [* 544] (*q*). The * direction for leasing under the true value is no part of the charity, and in fact is *void in itself for perpetuity* (*r*).

Under-value
must be
fraudulent to
render the
lease im-
peachable.

52. In considering the question of value it must be remembered that the case of a charity estate is one in which of all others, the *security* of the rent is the first

(*l*) *Ferraby v. Hobson*, 2 Ph. 258, *per* Lord Cottenham.

(*m*) See *Ferraby v. Hobson*, 2 Ph. 255.

(*n*) *Attorney-General v. Morgan*, 2 Russ. 306.

(*o*) *East v. Ryal*, 2 P. W. 284; *Attorney-General v. Lord Gower*, 9 Mod. 224, see 229; *Attorney-General v. Magwood*, 18 Ves. 315; *Attorney-General v. Dixie*, 13 Ves. 519; *Poor of Yervel v. Sutton*, Duke, 43; *Eltham Parish v. Warreyn*, Duke, 67; *Wright v. Newport Pond School*, Duke, 46; *Rowe v. Almsmen of Tavistock*, Duke, 42; *Crouch v. Citizens of Worcester*, Duke, 33; *Attorney-General v. Foord*, 6 Beav. 288.

(*p*) *Attorney-General v. Cross*, 3 Mer. 541, *per* Sir W. Grant.

(*q*) *Watson v. Hinsworth Hospital*, 2 Vern. 596; and see *Lydiatt v. Foach*, Id. 410; *Attorney-General v. Master of Catherine Hall*, Cambridge, Jac. 381; *Attorney-General v. St. John's Hospital*, 1 L. R. Ch. App. 92.

(*r*) *Hope v. Corporation of Gloucester*, 7 De G. M. & G. 647; *Attorney-General v. Greenhill*, 33 Beav. 193.

point to be regarded, and therefore the inadequacy of the amount reserved is less a badge of fraud in this than it would be in almost any other instance (s). And Lord Eldon desired it might not be considered to be his opinion that a tenant who had got a lease of charity lands at too low a rate with reference to the actual value was therefore to be turned out, if it appeared he had himself acted fairly and honestly. The only ground for so dealing with him would be some *evidence* or *presumption* of collusion or corruption of motive (t).

53. When leases are set aside for under-value and the Court awards a *compensation* to the charity for the loss which has been sustained by the charity through the collusion of the trustees and the tenant, the burden will fall upon the trustees or the tenant according to the circumstances of the case (u). For whatever length of time renewals of leases of *charity* lands upon payment of fines certain may have been granted, and though in pursuance of a scheme settled by the Courts, the tenants have gained no right, and cannot insist upon any further renewals (v). But if money has been laid out in improvements upon the faith of renewals, and the lessees have not been recouped their outlay by any subsequent enjoyment of the property, the Court, in the charity scheme, will have regard to their claims (w).

Compensation for the under-value.

54. A lease of charity lands may also be invalidated on the ground of the *unreasonable extent of the term*. The duration of the lease should be such only as is consistent with the fair and provident management of the estate (x). It was therefore always a direct violation of duty to grant a lease for one thousand years (y), not only on the ground before noticed that such a demise would in effect be an absolute alienation, but also on the * principle that no private proprietor [* 545] would choose to debar himself from profiting by the progressive improvement of the property. Sir Thomas

Unreasonable extent of the lease

(s) *Ex parte Skinner*, 2 Mer. 457, *per* Lord Eldon.

(t) *Ex parte Skinner*, 2 Mer. 457.

(u) See *Duke*, 116; *Poor of Yervel v. Sutton*, Id. 45; *Attorney-General v. Mayor of Stamford*, 2 Sw. 592, *per Cur.*; *Attorney-General v. Dixie*, 13 Ves. 540; *Rowe v. Almsmen of Tavistock*, *Duke*, 42.

(v) *Attorney-General v. St. John's Hospital*, 1 L. R. Ch. App. 92.

(w) S. C.

(x) See *Attorney-General v. Owen*, 10 Ves. 560; *Attorney-General v. Brooke*, 18 Ves. 326; *Attorney-General v. Griffith*, 13 Ves. 575.

(y) *Attorney-General v. Green*, 6 Ves. 542; *Attorney-General v. Cross*, 3 Mer. 540; *Attorney-General v. Dixie*, 13 Ves. 531; *Attorney-General v. Brooke*, 18 Ves. 326.

Plumer observed, "The compensation which the trustees receive may be adequate at the date of the contract, but they are precluded for one thousand years from any advantage of *increased* value. It is true they are secured from *diminution*, and in some instances to guard against fluctuation may be as much the interest of one party as the other; but that would be an answer to all cases in which the trustees have made an alienation at a fixed rent. At the same time," continued his Honour, "it is just to say, that these principles seem not to have been acted upon at so early a period as 1670. In many cases in Duke's collection the Court acted on inadequacy of value, in none on mere extent of term" (z).

Husbandry
leases.

55. *Husbandry* or *farm* leases should not be granted for a term certain exceeding *twenty one years* (a). But neither is this rule to be taken as absolutely inflexible; but where the alienation is for any longer period, as for ninety-nine years, the Court will put it upon those who are dealing *for* and *with* the charity estate to show the reasonableness of such a transaction, for *prima facie* it is unreasonable: there is no instance of a power in a marriage settlement to lease for ninety-nine years, except with reference to very particular circumstances; the ordinary husbandry lease is for twenty-one years (b).

Leases de-
terminable
on lives.

56. In *Attorney-General v. Cross* (c), the trustees had been in the habit of granting leases for ninety-nine years, *determinable on lives*, in consideration of fines and the reservation of a small rent, a mode of letting very general in the county where the lands were situate, and which was proved to have been adopted by the founder himself. A bill was filed to set aside such a lease, but Sir W. Grant said, "I am not aware of any

(z) *Attorney-General v. Warren*, 2 Sw. 304. But see *Poor of Yervel v. Sutton*, Duke, 43, resolution 2; *Rowe v. Almsmen of Tavistock*, Id. 42; *Wright v. Newport Pond School*, Id. 46; *Crouch v. Citizens of Worcester*, Id. 33.

(a) See *Attorney-General v. Owen*, 10 Ves. 560; *Attorney-General v. Backhouse*, 17 Ves. 291; *Rowe v. Almsmen of Tavistock*, Duke, 42; *Wright v. Newport Pond School*, Id. 46; *Poor of Yervel v. Sutton*, Id. 43, resolution 2; *Attorney-General v. Pargeter*, 6 Beav. 150.

(b) *Attorney-General v. Owen*, 10 Ves. 560, *per* Lord Eldon; and see *Attorney-General v. Griffith*, 13 Ves. 575; *Attorney-General v. Backhouse*, 17 Ves. 291; *Attorney-General v. Brooke*, 18 Ves. 326; *Attorney-General v. Lord Hotham*, T. & R. 216; *Attorney-General v. Kerr*, 2 Beav. 421; *Attorney-General v. Hall*, 16 Beav. 388.

(c) 3 Mer. 524; see pp. 530, 539.

principle or authority on which it can be held that such a lease is on the very face of it a breach of trust. The legislature has, both in enabling and disabling statutes, * considered *leases for three lives as on* [* 546] *a footing with leases for twenty-one years absolute*. So have the founders of charities, who prohibited the letting on lease for more than three lives, or twenty-one years." And his Honour dismissed the bill, and allowed the trustees their costs out of the charity estate.

57. In a later case, where charity lands had for two hundred years been let for *lives upon a fine or foregift* at a small reserved rent, Lord Langdale said there was no principle that a lease of a charitable estate for lives was, on the face of it, a breach of trust; and as there appeared no other ground of invalidating the leases, he refused to set them aside (*d*). Leases for lives.

58. *Building* leases should be for a term not exceeding sixty, or ninety, or ninety-nine years (*e*). If granted for a longer period, it would be thrown upon the parties to show the reasonableness of the prolonged term from the particular circumstances of the case. Building leases.

59. What has been said as to the proper duration of leases is of course only applicable where the founder himself has not otherwise given directions, for in general the will of the settlor, where explicit, must be strictly followed; as if the terms of the endowment be that the charity estates shall be *let only for twenty-one years*, the trustees, though satisfied that leases for ninety-nine years would be more beneficial, could not make such a deviation from the directions of the trust *without the sanction of the Court*. It was said on one occasion, with reference to such variations from the founder's intention that the Court itself could not give a good title to the lessee, but that it required the authority of an Act of Parliament (*f*). It is plain, however, that there is a wide distinction between a deviation from the founder's intention as to the *objects* of the charity, and a deviation from the directions as to *management*, which were no doubt originally meant to be governed by circumstances. Founder's intention.

60. When there has been no actual fraud, and the lessee or assignee of the lease is ejected after having laid out money in the permanent improvement of the Improvements by lessees.

(*d*) Attorney-General v. Crook, 1 Keen, 121, see 126.

(*e*) See Attorney-General v. Owen, 10 Ves. 560; Attorney-General v. Backhouse, 17 Ves. 291; Attorney-General v. Foord, 6 Beav. 290.

(*f*) Attorney-General v. Mayor of Rochester, 2 Sim. 34.

property, the Court will direct an inquiry to what extent the charity estate has been benefited, and will allow the holder of the lease the amount of the benefit found (g).

Late Acts.

[* 547] * 61. By the Charitable Trusts Acts the Commissioners of Charities are empowered to authorize the grant by charity trustees of *building, repairing, improving, mining or other leases* (h), and the trustees are restricted from granting *without* the sanction of the Commissioners "any lease *in reversion* after more than *three years* of any existing term, or for any *term of life*, or in consideration wholly or in part of *any fine*, or for *any term of years exceeding twenty-one years*" (i).

[Agricultural Holdings Act.]

[62. The powers conferred by the Agricultural Holdings (England) Act, 1883, on a landlord in respect of charging the land are not to be exercised by trustees for ecclesiastical or charitable purposes, except with the previous approval in writing of the Charity Commissioners (k).]

Power of majority to pass legal estate.

63. By 32 & 33 Vict. c. 110, s. 12, it is enacted that "where the trustees or persons acting in the administration of any *charity* have power to determine on any sale, exchange, partition, mortgage, lease, or other disposition of any property of the charity, *a majority of those trustees or persons who are present at a meeting of their body duly constituted*, and vote on the question, shall have and be deemed to have *always had* full power to execute and do all such assurances, acts and things as may be requisite for carrying any such sale, exchange, partition, mortgage, lease or disposition into effect; and all such assurances, acts and things shall have the same effect as if they were respectively executed and done by all such trustees or persons for the time being, and by the official trustee of charity lands" (l). The majority, therefore, in those cases of charity can bind the estate not only in equity but at law also, and that, whether the legal estate be vested in the trustees or other the persons aforesaid, or in the official trustee of charity lands.

(g) Attorney-General v. Day, V.C. Knight Bruce, March 9, 1847; and see Attorney-General v. Green, 6 Ves. 452; Attorney-General v. Kerr, 1 Beav. 420; Swan v. Swan, 8 Price, 518; Attorney-General v. Balliol College, 6 Mod. 411; Savage v. Taylor, Forr. 234; Shine v. Gough, 1 B. & B. 444.

(h) 16 & 17 Vict. c. 137, ss. 21, 26; 18 & 19 Vict. c. 124, s. 39.

(i) 18 & 19 Vict. c. 124, s. 29.

[(k) 46 & 47 Vict. c. 61, s. 40.]

(l) And see the nearly similar enactment of 23 & 24 Vict. c. 136, s. 16, and *ante*, p. 540.

64. By "The Charitable Trustees Incorporation Act, Charities 1872" (35 & 36 Vict. c. 24), it is enacted by s. 1, that from the date of the Act the trustees or trustee for the time being of any charity, may apply to the Charity Commissioners for a *certificate of registration*, and the Commissioners may grant such certificate subject to such conditions and directions as they may think fit as to the qualifications and number of the trustees, their tenure or avoidance of office, and the mode of appointing new trustees, and the custody * and use of the com- [* 548] mon seal, and thereupon the trustees shall become a *body corporate, by the name described in the certificate*, and may sue and be sued in their corporate name, and hold, acquire, convey, assign, and demise any present or future property of the charity as the trustees might have done before the incorporation. But the Act is not to extend, modify, or control the Act of 9th Geo. II. c. 36.

By section 2, the certificate of incorporation is to vest in the body corporate *all the real and personal estate* belonging to the charity, or held in trust for it; and persons in whose names any stocks, funds, or securities are standing in trust for the charity, are to transfer the same into the name of the body corporate; but, if such property be *copyhold*, liable to the payment of a fine or heriot on the death or alienation of the tenant, the lord of the manor shall receive a corresponding fine or heriot on the granting of the certificate, and a like fine or heriot at the expiration of every subsequent period of *forty years*. But the certificate is not to vest in the body corporate any stocks, funds or securities held by the *official trustees* of charitable funds, which are not to be transferable except under an order of the Commissioners, and by ordinary transfer or assignment.

By the 4th section, the Commissioners are to see that *proper trustees* have been appointed before they grant the certificate, and after the grant the *trusteeship is to be duly kept up*, and a return of the names of the trustees is to be made at the expiration of every five years.

By the 5th section, the *trustees* of the charity, notwithstanding their incorporation, shall *continue chargeable* for such property as shall come to their hands, and be answerable for their own acts, receipts, neglects, and defaults, and for the due administration of the charity.

By the 10th section, *donations and dispositions* in favour of the charity by deed, will, or otherwise, shall take effect as if the same had been made to the charity by its corporate name.

By the 11th section, *contracts by the trustees of a charity* which would have been valid and binding if no incorporation had taken place, shall be valid and binding though not made under the seal of the body corporate.

Exempted
charities.

65. It should be noticed that the *Universities* and the *Colleges* thereof, and various other bodies of a charitable description and charitable institutions wholly maintained by *voluntary contributions* (which expression is [* 549] used in contradistinction to the term **endowments (m)*), are accepted from the operation of the *Charitable Trusts Acts (n)*.

Roman
Catholic.
charities.

66. Charities the funds of which are applicable exclusively for the benefit of *Roman Catholics* were originally exempted for a period of two years, which was afterwards repeatedly extended, and by the latest of these Acts was extended to July 1st, 1860 (o). Roman Catholic charities have therefore now fallen within the operation of the *Charitable Trusts Acts*.

(m) See *Governors for Relief of Widows, &c. of Clergymen v. Sutton*, 27 Beav. 651.

(n) 16 & 17 Vict. c. 137, s. 62; 18 & 19 Vict. c. 124, s. 47.

(o) 19 & 20 Vict. c. 76; 20 & 21 Vict. c. 76; 21 & 22 Vict. c. 51; 22 & 23 Vict. c. 50; and see 23 & 24 Vict. c. 134.

OF TRUSTEES UNDER THE SETTLED LAND ACTS.

UNDER the Settled Land Act, 1882, fundamental changes have been introduced in dealing with and disposing of Settled Estates, the powers which under the old law were usually given to the trustees of the settlement, and in some cases much more extensive powers, having been conferred on tenants for life and other limited owners. With a view, probably, to the protection of the remaindermen (though such protection has not been satisfactorily provided for), a class of trustees has been called into existence whose duties arise under the Act; but these duties are, with a few exceptions, to which attention will be drawn, principally of a ministerial nature, and do not involve the exercise of discretion. In the present chapter we propose to treat of the position and duties of these trustees; but incidentally to this it will be necessary to refer to the principal provisions of the Act, and to glance at the important changes which have been introduced by it.

1. The trustees for the purposes of the Settled Land Act may either be nominated by the settlement itself, [Trustees of the settlement.] or appointed by the Court; and sect. 2 of the Act of 1882, provides that "the persons, if any, who are for the time being, under a settlement (*p*), trustees with power of sale of settled land, or with power of consent to or approval of the exercise of such a power of sale, or if under a settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees * thereof for [* 551]

[*(p)*] The term "settlement" includes any instrument, or any number of instruments, whether made before or after, or partly before and partly after the commencement of the Act, under which land, or any estate or interest in land, stands limited to or in trust for persons in succession; see sect. 2, sub-s. (1). It has, however, been held by Pearson, J., that where there is an original settlement complete in itself, and derivative settlements have afterwards been made by persons who take interests which have not yet fallen into possession under the original settlement, the original settlement alone is the settlement for the purposes of the Act, *Re Knowles' Settled Estates*, 27 Ch. D. 707; but this view seems hardly consistent with the language of the Act.

the purposes of the Act, are for the purposes of the Act trustees of the settlement." From this definition it appears that in the case of settlements created before the Act, trustees with a power of sale, or a power of consenting to or approving of a sale, if there are any such trustees, and they only, are "trustees of the settlement" within the meaning of the Act. But trustees to whom personal estate has been bequeathed upon trust to convert it and invest the proceeds in the purchase of real estate to be settled strictly, are not trustees of the settlement for the purposes of the Act (*g*).

[Executors with charge of debts.]

Executors or trustees who, under a charge of debts, have an over-riding power to sell settled land, seem to be trustees for the purposes of the Act.

In instruments since the Act it is usual and proper to appoint expressly trustees of the settlement for the purposes of the Act.

[Appointment by the Court.]

2. Where there are no trustees of the settlement within the definition, or where in any other case it is expedient for the purposes of the Act that new trustees of the settlement should be appointed, the Court may, if it thinks fit, on the application of the tenant for life, or of any other person having under the settlement an estate or interest in the settled land, in possession, remainder or otherwise, or in the case of an infant of his testamentary or other guardian or next friend, appoint fit persons to be trustees under the settlement for the purposes of the Act (*r*).

The exercise of this power is in the discretion of the Court, and it has been laid down in a case in Ireland, that, upon an application under this section to appoint trustees, the Court should not only require to be satisfied of the fitness of the proposed trustees, but also that the purpose for which their appointment is asked is such as to render their appointment safe and beneficial to all parties interested. And where the application was with a view to having a large fund taken out of Court and invested upon mortgage of lands in Ireland, it was refused (*s*).

[On summons.]

3. The application to the Court should be by summons, which should be served on the trustees (if any), and also on the tenant for life, if he is not the applicant, but not on any other person unless the Judge so directs (*t*).

(*g*) *Burke v. Gore*, 13 L. R. Ir. 367.

(*r*) Sect. 38, sub-sect. (1).

(*s*) *Burke v. Gore*, 13 L. R. Ir. 367.

(*t*) Rules of the Supreme Court under the Settled Land Act, 1882, R.R. 2, 4 and 6.

The persons appointed by the Court, and the survivors and survivor of them, while continuing to be trustees or trustee, and until the appointment of new trustees the personal representatives or * repre- [* 552] sentative for the time being of the last surviving or continuing trustee, are for the purposes of the Act the trustees or trustee of the settlement (*u*).

As the appointment of trustees is required to impose a check upon the extensive powers conferred upon the tenant for life, and sect. 44 contemplates the probability of there being differences between the trustees and the tenant for life, the Court will not appoint any member of the firm of solicitors who act for the tenant for life (*v*), and *à fortiori* will not appoint the actual tenant for life, or any person who may become tenant for life, to be a trustee of the settlement (*w*).

[Solicitor of tenant for life not appointed trustee.]

The share of an infant under the Statute of Distributions in realty which has been improperly allowed to remain unconverted, is settled land within the meaning of the Act, so as to enable the Court, under sect 38, to appoint trustees to exercise the powers of the Act; but the order appointing the trustees will be made without prejudice to any question as to the interests of the infants (*x*).

[Infant's share in unconverted realty.]

Where a tenant for life is a lunatic, and his committee applies, under sect. 62 of the Act, for an order enabling him to exercise the powers of the Act, and no trustees are in existence, new trustees must be appointed for the purposes of the Act, and be served with notice of the application (*y*).

[Tenant for life a lunatic.]

4. By sect. 39, sub-sect. (1), capital money arising under the Act is not to be paid to fewer than two persons as trustees of a settlement, unless the settlement authorizes the receipt of capital trust money of the settlement by one trustee. But subject thereto, by sub-sect. (2), the provisions of the Act referring to the trustees of a settlement apply to the surviving or continuing trustees or trustee of the settlement for the time being.

Where personal estate is settled so that the trustees have authority to vary the investments, and after-ac-

(*u*) Sect. 38, sub-sect. (2).

(*v*) *Re Kemp's Settled Estates*, 24 Ch. D. 485; *Re J. Walker's Trusts*, 48 L. T. S. S. 632; 31 W. R. 716.

(*w*) *Re Harrop's Trusts*, 24 Ch. D. 717.

(*x*) *Re Wells*, 48 L. T. N. S. 859; 31 W. R. 764; but see *Re Greenville Estate*, 11 L. R. Ir. 138.

(*y*) *Re Taylor*, 52 L. J. N. S. Ch. 728; 31 W. R. 596; 49 L. T. N. S. 420.

quired property is settled, by reference, upon the same trusts, the trustees, having an implied power of sale, fall within the definition of trustees of the settlement for the purposes of the Act (*a*), and if in such a case power is given by the settlement to the trustees or trustee to act and give receipts for moneys subject to the [* 553] trusts of the settlement, * the case falls within the exception of sect. 39, sub-sect. (1), and a single trustee may receive the purchase-money of the real estate arising from a sale by the tenant for life (*a*).

[Tenant for life.]

5. We will next advert to the position of the tenant for life, and the powers given by the Act to the tenant for life, under which term we shall include not only the person or persons beneficially entitled to the possession of the settled land, or the receipt of the income thereof for his life (*b*), but also the limited owners, who, under sect. 58, have the powers of a tenant for life under the Act.

[Defined.]

We may here remark that by sect. 2, the tenant for life is defined to be "the person for the time being under a settlement beneficially entitled to possession of settled land for his life" (*c*); and "if there are two or more persons so entitled as tenants in common, or as joint tenants, or for other concurrent estates or interests, they together constitute the tenant for life for the purposes of the Act"; and a person who is "tenant for life within the foregoing definition is to be deemed such, notwithstanding that, under the settlement or otherwise, the settled land, or his estate or interest therein, is incumbered or charged in any manner or to any extent"; and, by sub-sect. (10), possession includes receipt of income.

[Persons having powers of tenant for life.]

6. By sect. 58, sub-sect. (1), the powers of a tenant for life are given to each of the following persons, when his estate or interest is in possession, namely—

(1). A tenant in tail, including a tenant in tail who is by Act of Parliament restrained from barring or defeating his estate tail, and although the reversion is in the Crown, and so that the exercise by him of his powers shall bind the Crown, but not including such a tenant in tail where the land in respect whereof he is so restrained was purchased with money provided by Parliament in consideration of public services.

(*a*) *Re Garnett Orme and Hargreaves' Contract*, 25 Ch. D. 595.

(*b*) See sect. 2, sub-ss. (5) and (10) (i).

(*c*) By sect. 8 of the Settled Land Act, 1884, the estate of a tenant by the curtesy is, for the purpose of the Act of 1882, to be deemed an estate arising under a settlement made by his wife.

(2). A tenant in fee simple, with an executory limitation, gift, or disposition over, on failure of his issue, or in any other event.

(3). A person entitled to a base fee, although the reversion is in the Crown, and so that the exercise by him of his powers shall bind the Crown.

(4). A tenant for years determinable on life, not holding merely under a lease at a rent.

* (5). A tenant for the life of another, not [* 554] holding merely under a lease at a rent.

(6). A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by conditional limitation, or otherwise, or to be defeated by an executory limitation, gift, or disposition over, or is subject to a trust for accumulation of income for payment of debts or other purpose.

(7). A tenant in tail after possibility of issue extinct.

(8). A tenant by the curtesy.

(9). A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land, or until forfeiture of his interest therein on bankruptcy or other event.

Under this section it has been held that, where estates were devised to the use of trustees upon trust to pay the net income to the testator's wife, for the maintenance, education, and benefit of the testator's son until he should attain twenty-one, and without being liable to account to the trustees or to the son for the same, and upon the son's attaining twenty-one, then upon trust for him absolutely, but if he should die under twenty-one without leaving issue, then upon other trusts, the infant son had the powers of a tenant for life, as being tenant in fee simple, with an executory limitation over in the event of his death under twenty-one without issue (*d*). So where, subject to a term for raising certain sums, freehold estates were devised to the use of trustees during the life of A., with remainders over, and the trustees were to enter into possession, and during the life of A. manage the property and pay all expenses and outgoings, and keep down the interest on charges, and pay an annuity, and then

(*d*) *Re Morgan*, 24 Ch. D. 114.

pay the ultimate residue of the rents and profits to A., and the income was insufficient after payment of the outgoing and interest to pay the annuity, it was held that A. came within sub-sect. (1), clause (9), of sect. 58, and had the powers of a tenant for life (e). So where estates were limited to trustees for a term of 1300 years, and subject thereto to A. for life, with remainders over in strict settlement, and the trusts of the term were to raise portions, to pay annuities, including an annuity to A., and to apply the residue as a sinking fund to pay off mortgage debts and other charges, and the trustees were, "during the [* 555] * continuance of the trusts," to enter into and hold possession of the rents and profits of the estate, and "not deliver the same to any person beneficially interested in any part thereof," and manage the estate as therein mentioned, and full powers of management were given to the trustees, and they were also given such other powers over the estate as were given to a tenant for life in possession by the Settled Land Act, 1882, it was held that A. was a tenant for life or a person having the powers of a tenant for life within the meaning of the Act, and that the trustees could not sell or enfranchise without his consent, as required by sect. 56 of the Act (f).

A gift of an estate comprised in a lease for years to a person during the remainder of the term, if he shall so long live, is not within either clause (4) or clause (6) of sub-sect. (1), and the devisee cannot exercise the powers of a tenant for life under the Act (g).

[Powers of
tenant for
life.]

7. Speaking in general terms, the Settled Land Act has not only given to the tenant for life all the powers of disposition of the settled land which were previously given in well-drawn settlements to the tenant for life, or to the trustees with the consent of the tenant for life, but has also conferred on the tenant for life larger and more extended powers, and has effected a complete revolution in the manner of dealing with settled estates, and in the mutual relations of the tenant for life and trustees. Thus the Act has given to the tenant for life an absolute power at his own discretion to sell, enfranchise and exchange the settled land, to grant building, mining and other leases thereof, to concur in a partition, to accept surrenders of lease, to dedicate parts of

(e) *Re Jones*, 24 Ch. D. 583, 26 Ch. D. 736.

(f) *Re Clitheroe Estate*, 28 Ch. D. 378.

(g) *Re Hazle's Settled Estates* 26 Ch. D. 429; affirmed, 29 Ch. D. 78.

the settled lands for streets and open spaces, and other similar purposes, and various other powers, the details of which, and the conditions and restrictions upon and subject to which they are exercisable, do not fall within the purview of the present work.

8. These powers of the tenant for life are not capable of assignment or release, and do not pass to a person as being by operation of law or otherwise an assignee of a tenant for life, and remain exercisable by a tenant for life after and notwithstanding any assignment of his estate or interest; and a contract by the tenant for life not to exercise any of the powers is void. But the exercise of the powers will be without prejudice to the rights of the assignee for value of the tenant for life's estate or interest; and the assignee's rights are not to be affected without his consent, except * that unless the assignee is in actual possession of the settled land or part thereof, his consent is not to be requisite for the making of leases by the tenant for life at the best rent, without fine, and in other respects in conformity with the Act (*h*).

[Cannot be assigned or released.]

By sect. 51, any provision in a settlement tending or intended to prohibit or prevent the tenant for life from exercising, or to induce him to abstain from exercising, or to put him into a position inconsistent with his exercising any power under the Act, is made void; and by sect. 52, notwithstanding anything in a settlement, the exercise by the tenant for life of any power under the Act shall not occasion a forfeiture.

[Provisions prohibiting exercise of powers void.]

9. By sect. 56, the powers conferred by the Act are not to affect prejudicially any powers subsisting under the settlement, or by statute or otherwise, exercisable by a tenant for life, or by trustees, and the powers given by the Act are cumulative, by which is understood that the powers of the settlement, and those under the Act, are co-existent, and that it is optional with the tenant for life to exercise the powers conferred by the Act, or, his consent to the exercise by the trustees of their powers being rendered necessary by sub-sect. (2), to allow the powers under the settlement to be exercised (*i*).

[Powers of the Act cumulative.]

(*h*) Sect. 50. In this section "assignment" includes assignment by way of mortgage, and any partial or qualified assignment, and any charge or incumbrance, and "assignee" has a corresponding meaning.

(*i*) As to the effect of the restriction in sub-sect (2), on the powers of trustees, see chap. XXIII. s. 2, v.; and see *Re Duke of Newcastle's Estates*, 24 Ch. D. 129; *Re Chaytor's Settled Estate Act*, 25 Ch. D. 651; *Re Barrs-Haden's Settled Estates*, W. N. 1883, p. 188.

[Powers of tenant for life absolute.]

[But in exercising them he is in position of a trustee.]

10. One of the objects of the Act doubtless was to give the tenant for life, in his uncontrolled discretion, large and absolute powers of dealing with and disposing of the settled land, without requiring him to procure the consent of any person interested in remainder, or making him responsible to any one for the exercise of his discretion; subject only to this, that by sect. 53 the tenant for life, in exercising any power under the Act, is to have regard to the interests of all parties entitled under the settlement, and is, in relation to the exercise thereof by him, to be deemed in the position, and to have the duties and liabilities of a *trustee* for those parties.

In one case, Pearson, J., even said, "there is nothing in the Act to enable the Court to restrain the tenant for life from selling, whether he desires to sell because he is in debt and wishes to increase his income, or whether, without being in debt, he thinks he can increase his income, or whether he desires to sell from mere [* 557] *unwillingness to take the trouble involved in the management of landed property, or whether he acts from worse motives, as from mere caprice or whim, or because he is desirous of doing that which he knows would be very disagreeable to those who expect to succeed him at his death. There is not, so far as I can see, any power, either in the Court or in trustees, to interfere with his power of sale" (*k*). But this seems to go too far, and not to give due effect to the provisions of sect. 53, under which the tenant for life is, in relation to the exercise of the powers of the Act, made a trustee for all parties interested, and must, it is conceived, in the exercise of his discretion, be subject to the same rules as any other trustee; and be liable to the interference of the Court if the exercise of the discretion is affected by improper motives (*l*).

And in a subsequent phase of the same case, the remainderman having offered to purchase the estate for 7,500*l.*, and undertaken at the bar not to withdraw his offer, an injunction was granted by Kay, J., to restrain the tenant for life from selling for less than 7,500*l.*, and from entering into any contract (otherwise than by public auction), for sale of the estate, or any part thereof, without first communicating the offer to the remainder-

(*k*) *Wheelwright v. Walker*, 23 Ch. D. 752; *Re Chaytor's Settled Estate Act*, 25 Ch. D. 651; and see *Thomas v. Williams*, 24 Ch. D. 558.

(*l*) See *post*, p. 616; and see *Re Mansel's Settled Estates*, W. N. 1884, p. 209.

man, and giving him two clear days to make an advance on the price offered (*m*)

It is conceived, that the fact that a decree has been made in a pending action for the execution of the trusts of a will or settlement of realty, will not prevent a tenant for life thereunder from exercising the powers of the Act without procuring the consent of the Court. To require such consent would be to impose a fetter on the free alienation by the tenant for life inconsistent with the spirit and terms of the Act (*n*).

[Effect of decree in action to execute trusts.]

11. By sect. 45, sub-sect. (1), the tenant for life, when intending to make a sale, exchange, partition, lease, mortgage, or charge, is to give notice of his intention to each of the trustees of the settlement, and also to the solicitor for the trustees, if any such solicitor is known to the tenant for life, by registered letter, posted not less than one month before the making by the tenant for life of the sale, exchange, partition, lease, mortgage, or charge, or of a contract for the same; and by sub sect. (2), at the date of notice given the number of trustees shall not be less than two, unless a contrary intention is expressed in the settlement. Under this section it * was held that a general notice of intention to sell or lease all or any part of the settled estate at any time or times as opportunity should occur, was insufficient (*o*), but by sect. 5 of the Settled Land Act (*p*), it is now provided, by sub-sect. (1), that the notice required by sect. 45 of the Act of 1882 of intention to make a sale, exchange, partition, or lease, may be notice of a general intention in that behalf; but by sub-sect. (2), the tenant for life is, upon request by a trustee of the settlement, to furnish to him such particulars and information as may reasonably be required by him from time to time with reference to sales, exchanges, partitions, or leases effected or in progress, or immediately intended; and the section applies, by sub-sect. (4), to a notice given before, as well as to a notice given after, the passing of the Act; provided, by sub-sect. (5), that no objection to such notice was taken before the passing of the Act.

[Notice to trustees.]

[General notice sufficient.]

It is to be observed that the Act of 1884 does not extend to the case of notice of intention to make a mortgage or charge; and such a notice, to be valid, must

[Except as to a mortgage or charge.]

(*m*) *Wheelwright v. Walker*. 48 L. T. N. S. 867; 31 W. R. 912.

(*n*) So now decided, *Lady Cardigan v. Curzon-Howe*, 33 W. R. 836.

(*o*) *Re Ray's Settled Estates*, 25 Ch. D. 464.

(*p*) 47 & 48 Vict. c. 18.

specify the particular mortgage or charge contemplated at the time when the notice is given (*p*).

[Committee of lunatic.]

The committee of a lunatic tenant for life cannot give a legal notice under the Act, unless he has previously obtained the sanction of the Court of Lunacy thereto (*q*).

[Waiver of notice.]

Any trustee, by writing under his hand, may waive notice, either in any particular case or generally, and may accept less than one month's notice (*r*). And it is conceived that the waiver of notice, or acceptance of shorter notice, if signed by all the trustees, will extend as well to the notice to be given to the trustees' solicitor under the Act of 1882, as to the notice to be given to the trustees themselves.

[Where notice to sole trustee sufficient.]

12. Where trustees are appointed by a settlement with such powers as to make them, under sect. 2, of the Act of 1882, trustees of the settlement for the purposes of the Act, and the powers are made by the settlement exercisable by the trustees or *trustee* for the time being, it will be sufficient to give notice, under sect. 45, to a sole surviving or continuing trustee: and the number of trustees need not, for the purposes of the notice, be completed (*s*).

[Purchaser need not inquire as to notice.]

13. By sect. 45, sub-sect. (3), a person dealing in good faith with the tenant for life is not concerned to [* 559] inquire respecting the giving * of any notice required by that section. As, however, under the Act of 1882 at least a month's notice to the trustees was imperative, any person dealing with the tenant for life was bound to see that there had been, for at least that period, before any dealing took place, proper trustees to whom notice could have been given; but now, under the Act of 1884, it will be sufficient if the trustees, although more recently appointed, by writing under their hands, either waive notice altogether or accept a shorter notice, and it would seem to follow that the purchaser is not now in any case bound to do more than ascertain that there were trustees in existence at the time the contract was entered into.

[Notice by registered letter.]

If a shorter notice is accepted, it may still be sent by registered letter, as provided by the Act of 1882.

It is conceived that it is not essential to the validity of the notice that it should be sent by a registered letter, but that that is only a convenient mode authorized by the Act of serving the notice.

(*p*) *Re Ray's Settled Estates*, 25 Ch. D. 464.

(*q*) *Re Ray's Settled Estates*, *ubi supra*.

(*r*) 47 & 48 Vict. c. 18, s. 5 (3).

(*s*) *Re Garnett Orme and Hargreaves' Contract*, 25 Ch. D. 595.

14. We come now to consider what are the duties of trustees of the settlement under the Act after they have received a notice of an intended dealing by the tenant for life, and it is somewhat remarkable that, having regard to the importance attached by the Act to the service on the trustees of notice of any intended dealing by the tenant for life with the settled land, the Act should be silent as to what the trustees on their part ought to do in the interest of the remaindermen when they receive a notice. No doubt if it comes to their knowledge that the tenant for life is contemplating or attempting to commit a fraud—as, for instance, by selling or leasing the property at a gross undervalue under some secret arrangement by which he is to derive a personal benefit, it would be their duty to come to the Court and ask for an injunction to restrain the sale or lease (*t*). But if the dealing is not on the face of it fraudulent or improper, there is no obligation on the trustees to inquire into or take any steps in the matter; and in any case they are, by sect. 42, expressly protected from any liability for giving any consent, or for not making, bringing, taking or doing any such application, action, proceeding, or thing as they might make, bring, take or do.

[Duties of trustees on receipt of notice.]

On the whole, it seems that the protection afforded to the remaindermen against an improper exercise by the tenant for life of his powers by the appointment of trustees of the settlement, coupled with the notice to them under sect. 45, is of a very shadowy nature, and in the majority of cases is of no practical value.

* 15. There are however some powers which [* 560] the tenant for life can only put in force either with the consent of the trustees or under an order of the Court, and as to these the trustees before giving their consent must exercise their discretion on behalf of all persons interested. Thus under sect. 15, the principal mansion house on any settled land, and the demesnes thereof, and other lands usually occupied therewith, cannot be sold or leased by the tenant for life without such consent or order (*u*), and under sect. 35, a tenant for

[Where consent of trustees necessary to exercise of powers.]

[Sale of mansion house.]

(*t*) See *Wheelwright v. Walker*, 23 Ch. D. 752, 762.

(*u*) The Court will sanction a sale even though the testator has expressly directed that the mansion house is to be kept up as a place of residence for the person for the time being entitled to the possession thereof under his will, and that the heirlooms shall at all times be kept in the mansion house, if a proper case for sale is made out, but the sale will not be sanctioned without proper directions being given for the disposal of the heirlooms. They may, however, be sold under sect. 37, if the tenant for life so desires and the Court approves, *Re Brown's Will*, 27 Ch. D. 179.

[Timber.] life impeachable for waste in respect of timber, can on obtaining such consent or order, cut and sell timber ripe and fit for cutting.

[Improvements.] So again sect. 25, enumerates the various improvements which fall under the description of improvements [* 561] authorized by the act (v), * but by sect. 26,

(v) These improvements are the making or execution on, or in connection with, and for the benefit of settled land, of any of the following works, or of any works for any of the following purposes, and any operation incident to or necessary or proper in the execution of any of those works, or necessary or proper for carrying into effect any of those purposes, or for securing the full benefit of any of those works or purposes, namely:

(1). Drainage, including the straightening, widening, or deepening of drains, streams, and water-courses.

(2). Irrigation, warping.

(3). Drains, pipes, and machinery for supply and distribution of sewage as manure.

(4). Embanking or weiring from a river or lake, or from the sea, or a tidal wave.

(5). Groynes, sea walls, defences against water.

(6). Inclosing, straightening of fences, re-division of fields.

(7). Reclamation, dry warping.

(8). Farm roads, private roads, roads or streets in villages or towns.

(9). Clearing, trenching, planting.

(10). Cottages for labourers, farm-servants, and artizans, employed on the settled land or not.

(11). Farmhouses, offices, and outbuildings, and other buildings for farm purposes.

(12). Saw-mills, scutch-mills, and other mills, water-wheels, engine-houses, and kilns, which will increase the value of the settled land for agricultural purposes, or as woodland or otherwise.

(13). Reservoirs, tanks, conduits, water-courses, pipes, wells, ponds, shafts, dams, weirs, sluices and other works and machinery for supply and distribution of water for agricultural, manufacturing, or other purposes, or for domestic or other consumption.

(14). Tramways, railways, canals, docks.

(15). Jetties, piers, and landing places on rivers, lakes, the sea, or tidal waters, for facilitating transport of persons and of agricultural stock and produce, and of manure and other things required for agricultural purposes, and of minerals, and of things required for mining purposes.

(16). Markets and market-places.

(17). Streets, roads, paths, squares, gardens, or other open spaces for the use, gratuitously or on payment, of the public or of individuals, or for dedication to the public, the same being necessary or proper in connection with the conversion of land into building land.

(18). Sewers, drains, water-courses, pipe-making, fencing, paving, brick-making, tile-making, and other works necessary or proper in connection with any of the objects aforesaid.

(19). Trial pits for mines, and other preliminary works

sub-sect. (1), where the tenant for life is desirous that capital money arising under the Act, shall be applied in or towards payment for an improvement authorized by the Act (*w*), he may submit for approval to the trustees of the settlement, or to the Court as the case may require, a scheme for the execution of the improvement showing the proposed expenditure thereon; and by sub-sect. (2), where the capital money to be expended is in the hands of trustees, then, after a scheme is approved by them, the trustees may apply that money in or towards payment for the whole or part of any work or operation comprised in the improvement, on—

(A). A certificate of the land commissioners certifying that the work or operation, or some specified part thereof has been properly executed, and what amount is properly payable by the trustees in respect thereof, which certificate is to be conclusive in favour of the trustees, as an authority and discharge for any payment made by them in pursuance thereof; or on

(B). A like certificate of a competent engineer or able practical surveyor nominated by the trustees and approved by the commissioners, or by the Court, which certificate shall be conclusive as aforesaid; or on

(C). An order of the Court directing or authorizing the trustees to so apply a specified portion of the capital money.

16. We may here observe that under the term “capital money arising under the Act,” are comprised, (1). [Capital money under the Act.] Monies received upon any sale or enfranchisement, or for equality of exchange or partition; (2). Fines received on the grant of leases under any power conferred by the Act of 1882 (*x*); (3). The proportion of rent under mining leases to be set aside under sect. 11 of the Act of 1882; (4). Money raised on mortgage of the settled land, under sect. 18 of the Act; (5). Three-fourths of the net proceeds of the sale of timber cut under the powers of sect. 35, where the tenant for life * is impeachable for waste in respect of tim- [* 562]

necessary or proper in connection with development of mines.

(20). Reconstruction, enlargement, or improvement of any of those works.

(*w*) This section is not retrospective and does not apply to improvements effected before the passing of the Act. *Re Knatchbull's Settled Estate*, 27 Ch. D. 349; affirmed, 29 Ch. D. 588.

(*x*) The Settled Land Act, 1882, omitted to provide that these fines should be capital money under the Act, but the omission has been supplied by The Settled Land Act, 1884, s. 4.

ber; and (6). Money arising from the sale of heirlooms under sect. 37 of the Act.

[Money arising from other sources.]

By sect. 32, where under an Act incorporating or applying, wholly or in part, the Lands Clauses Consolidation Acts, or under the Settled Estates Act, 1877, or under any other Act, public, local, personal, or private, money is at the commencement of the Act in Court, or is afterwards paid into Court, and is liable to be laid out in the purchase of land to be made subject to a settlement, then, in addition to any mode of dealing therewith authorized by the Act under which the money is in Court, that money may be invested or applied as capital money arising under the Settled Land Act. And by sect. 33, where, under a settlement, money is in the hands of trustees (*y*), and is liable to be laid out in the purchase of land to be made subject to the settlement, then, in addition to such powers of dealing therewith as the trustees have independently of the Act, they may, at the option of the tenant for life, invest or apply the same as capital money arising under the Act.

[Application of capital money.]

17. By sect. 21, capital money arising under the Act, subject to payment of claims properly payable thereout, and to application thereof for any special authorized object for which the same was raised, is to be invested or applied in one or more of the following modes:

(1). In investment on Government securities; or on other securities on which the trustees, of the settlement are by the settlement or by law (*z*) authorized to invest trust money of the settlement, or on the security of the bonds, mortgages, or debentures, or in the purchase of the debenture stock, of any railway company in Great Britain or Ireland incorporated by special Act of Parliament, and having for ten years next before the date of investment paid a dividend on its ordinary stock or shares, with power to vary the investment into or for any other such securities.

(2). In discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land (*a*),

(*y*) It has been held in Ireland that this section does not apply to money in Court in an administration action, which has arisen from personal estate given to trustees upon trust to convert and to invest the proceeds in the purchase of lands to be settled; *Burke v. Gore*, 13 L. R. Ir. 367.

(*z*) As to investments authorized by law see *ante*, Chap. xiv, s. 4.

(*a*) The words "incumbrances affecting the inheritances of the settled land" must be taken in their ordinary sense of mortgages, portions, &c., and not as meaning incumbrances such as charges for land drainage and improvements created under the Land Improvement Act, 1854, and other similar Acts, which,

or other the whole estate * the subject of the [* 563] settlement (*b*), or of land-tax, rent-charge, in lieu of tithe, Crown-rent, chief rent, or quit-rent, charged on or payable out of the settled land.

(3). In payment for any improvement authorized by the Act (*c*).

(4). In payment for equality of exchange or partition of settled land.

(5). In purchase of the seignory of any part of the settled land, being freehold land, or in purchase of the fee simple of any part of the settled land, being copyhold or customary land.

(6). In purchase of the reversion or freehold in fee of any part of the settled land, being leasehold land held for years, or life, or years determinable on life.

(7). In purchase of land in fee simple, or of copyhold or customary land, or of leasehold land held for sixty years or more unexpired at the time of purchase, subject or not to any exception or reservation of or in respect of mines or minerals therein, or of or in respect of rights or powers relative to the working of mines or minerals therein or in other land.

(8). In purchase, either in fee simple, or for a term of sixty years or more, of mines and minerals convenient to be held or worked with the settled land, or of any easement, right, or privilege convenient to be held with the settled land for mining or other purposes.

(9). In payment to any person becoming absolutely entitled or empowered to give an absolute discharge.

(10). In payment of costs, charges, and expenses of or incidental to the exercise of any of the powers, or the execution of any of the provisions, of the Act.

(11). In any other mode in which money produced by the exercise of a power of sale in the settlement is applicable thereunder.

And under the Agricultural Holdings (England) Act, [Improvements under 1883 (*d*), capital money arising under the Settled Land

although in one sense affecting the inheritance, are in numerous cases charges rather affecting the tenant for life than the remainderman, *per* Pearson J.; *Re Knatchbull's Settled Estate*, 27 Ch. D. 359. Therefore, where before the passing of the Settled Land Act charges of this nature have been created, the tenant for life is not entitled to have them discharged out of the capital of the settled land, *Ib.* Affirmed 29 Ch. D. 588.

(*b*) It is not necessary that the incumbrance should affect the whole of the settled estates, it is sufficient if it affect any land the subject of the settlement; *Re Chaytor's Settled Estate Act*, 25 Ch. D. 651.

(*c*) For the authorized improvements, see *ante*, p. 560, note (*b*).

(*d*) 46 & 47 Vict. c. 61, s. 29.

Agricultural
Holdings
Act.]

Act, 1882, may be applied in payment of any monies expended and costs incurred by a landlord under the former Act in the execution of any improvement mentioned in the first or second parts of the schedule there- [* 564] to (e), as * for an improvement authorized by the Settled Land Act; and such money may also be applied in discharge of any charge created on a holding under the Act in respect of any such improvement as aforesaid, as in discharge of an incumbrance authorized by the Settled Land Act to be discharged out of such capital money.

[Subject to
direction of
tenant for
life.]

18. By sect. 22, sub-sect. (1), capital money arising under the Act is to be paid either to the trustees of the settlement or into Court, at the option of the tenant for life, and is to be invested or applied by the trustees, or under the direction of the Court, as the case may be accordingly.

Sub-sect. (2). The investment or other application by the trustees is to be made according to the direction of the tenant for life, and in default thereof, according to the direction of the trustees, but in the last-mentioned case subject to any consent required or direction given by the settlement with respect to the investment or other application by the trustees of the trust money of the settlement; and any investment is to be in the names or under the control of the trustees.

Sub-sect. (3). The investment or other application under the direction of the Court is to be made on the application of the tenant for life, or of the trustees.

Sub-sect. (4). Any investment or other application

(e) The first part of the schedule relates to improvements to which the landlord's consent is required, and comprises :

- (1). Erection or enlargement of buildings.
- (2). Formation of silos, as to the Court authorizing the formation of soils see *Re Broadwater Estate*, 33 W. R. 738.
- (3). Laying down of permanent pasture.
- (4). Making and planting of osier beds.
- (5). Making of water meadows or works of irrigation.
- (6). Making of gardens.
- (7). Making or improving of roads or bridges.
- (8). Making or improving of watercourses, ponds, wells, or reservoirs, or of works for the application of water power or for supply of water for agricultural or domestic purposes.
- (9). Making of fences.
- (10). Planting of hops.
- (11). Planting of orchards or fruit bushes.
- (12). Reclaiming of waste land.
- (13). Warping of land.
- (14). Embankment and sluices against floods.

The second part of the schedule relates to drainage an improvement in respect of which notice to the landlord is required.

is not during the life of the tenant for life to be altered without his consent.

Sub-sect. (5). Capital money arising under the Act, and the securities arising from the investment thereof, are for all purposes of disposition, transmission, and devolution, to be considered as land, and to be held and go accordingly.

Sub-sect. (6). The income of the securities is to be paid or applied as the income of the land, if not disposed of, would have been payable or applicable under the settlement.

Sub-sect. (7). The securities may be converted into money, which is to be capital money arising under the Act.

* It will be observed that the tenant for life [* 565] may *direct* in what manner, consistently with the Act, the capital money is to be invested or applied, and the duty of the trustees in carrying out such directions is purely ministerial, and, except where the consent or approval of the trustees is expressly required as for an outlay on improvements, does not involve the exercise of any discretion.

19. Where settled real estate has been sold under the Lands Clauses Consolidation Acts, and the purchase money paid into Court, the Court will appoint trustees of the settlement for the purposes of the Settled Land Act, and order the fund in Court to be paid out to them to be held upon the trusts of the settlement (*f*).

20. By sect. 23, capital money arising under the Act from settled land in England is not to be applied in the purchase of land out of England, unless the settlement expressly authorizes the same. [Purchases confined to England.]

21. By sect. 24, land acquired by purchase or in exchange, or on partition, is to be made subject to the settlement, as follows: Freehold land is to be conveyed to the uses, on the trusts, and subject to the powers and provisions subsisting with respect to the settled land, but not so as to increase or multiply charges or powers of charging. Copyhold, customary, or leasehold land is to be conveyed to and vested in the trustees of the settlement on trusts, and subject to powers and provisions corresponding with the uses, trusts, powers, and provisions of the freehold land, but so that the beneficial interest in land held by lease for years shall not vest absolutely in a person who is by the settlement [Form of conveyances.]

(*f*) *Re Harrop's Trusts*, 24 Ch. D. 717; *Re Wright's Trusts*, 24 Ch. D. 662; *Re Duke of Rutland's Settlement*, W. N., 1883, p. 140.

made by purchase tenant in tail, or in tail male, or in tail female, and who dies under twenty-one.

[Application of money arising from limited interests.]

22. By sect. 34, where capital money arising under the Act is purchase-money paid in respect of a lease for years, or life, or for years determinable on life, or in respect of any other estate or interest in land less than a fee simple, or in respect of a reversion, the trustees of the settlement or the Court, as the case may be, may require the same to be laid out, invested, accumulated and paid in such manner as in the judgment of the trustees or of the Court, as the case may be, will give to the parties interested in that money the like benefit therefrom, as they might lawfully have had from the lease, estate, interest, or reversion, in respect whereof the money was paid, or as near thereto as may be.

Under this section it will be the duty of the trustee to take care upon a sale by the tenant for life of a lease-[* 566] hold interest, or a *reversion, that the proceeds of the sale are so dealt with as not to affect the relative interests of the tenant for life and remainderman (*g*). This section corresponds with the 74th section of the Lands Clauses Consolidation Act, 1845, and its construction will be regulated by the decisions under that Act (*h*). Thus, if the property is subject to a lease at a rent less than the income produced by the investment of the purchase-money the tenant for life will be entitled during the remainder of the term, for which the property was let, to a sum equal only to the rent, and the residue of the income should be accumulated at compound interest until the end of the term, after which the tenant for life will be entitled to the whole of the income including the income of the accumulations (*i*).

So, on the other hand, if the property sold was a lease for a short term, the tenant for life is entitled to receive an annuity of such an amount as will exhaust the proceeds of sale in the number of years which the lease had to run (*k*).

[Heirlooms.]

23. By sect. 37, sub-sect. (1), where personal chattels are settled on trust so as to devolve with land until a tenant in tail by purchase is born, or attains the age of twenty-one years, or so as otherwise to vest in some person becoming entitled to an estate of freehold of

(*g*) See *Re Griffith's Will*, 49 L. T. N. S. 161.

(*h*) *Cottrell v. Cottrell*, W. N. 1885, p. 23, now reported, 28 Ch. D. 628.

(*i*) *Re Wootton's Estate*, 1 L. R. Eq. 589; *Re Mette's Estate*, 7 L. R. Eq. 72; *Re Wilkes' Estate*, 16 Ch. D. 597; *Cottrell v. Cottrell*, 33 W. R. 361; 28 Ch. D. 628.

(*k*) *Askew v. Woodhead*, 14 Ch. D. 27.

inheritance in the land, a tenant for life of the land may sell the chattels or any of them; and by sub-sect. (2), the money arising by the sale is to be capital money arising under the Act, and to be paid, invested, or applied, and otherwise dealt with in like manner in all respects as by the Act directed with respect to other capital money arising under the Act, or may be invested in the purchase of other chattels, of the same or any other nature, which are to be settled and held on the same trusts, and to devolve in the same manner as the chattels sold; but by sub-sect. (3), no sale or purchase of chattels under this section is to be made without an order of the Court.

A dignity or title of honour which descends to the heirs general or heirs of the body, is within the definition of land, and heirlooms settled so as to devolve with the dignity or title may be sold under this section; *Re Sir J. R. Carnac's Will*, 33 W. R. 837; W. N. 1885, p. 142. [Whether proceeds of heirlooms devolve as personalty.]

We have already referred to the sections regulating the application or disposition of capital money arising under the Act (1), and it is to be observed that under sect. 22, sub-sect. (5), capital money is "for all purposes of disposition, transmission, and devolution, to be considered as *land*," and is to be held for, and go to, the same persons successively, in the same manner, and for and on the same *estates, interests, and [* 567] trusts, as the *land* wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement." It has been doubted whether this sub-section has any application to money arising from the sale of personal chattels; and there seems no sound reason for making the money arising from the chattels devolve as land, while if it is re-invested in other chattels they are to devolve as personalty. The latter part of the sub-section points to money arising from *land* as being the subject matter to which it relates and it would be construing the sub-section in direct opposition to the spirit in which it is framed to hold, that, while its apparent object was to leave the estates and interests of the persons beneficially interested in land unaffected by the sale, when applied, by reference, to money arising from personal chattels it is to have the effect of altering the nature of the estates, and in most cases of changing an absolute estate in remainder into a mere tenancy in tail. To effectuate such a change the language of the Act should be clear and unam-

(1) See *ante*, p. 562.

biguous, and it is conceived that the language of subsect. (5) does not meet that test, and that the devolution of the moneys arising from personal chattels will remain unaffected by the sale (*m.*)

[Receipts.]

24. By sect. 40, the receipt in writing of the trustees of a settlement, or where one trustee is empowered to act, of one trustee, or of the personal representatives or representative of the last surviving or continuing trustee, for any money or securities paid or transferred to them or him is made a good discharge, and, in the case of a mortgagee or other person advancing money, exonerates him from being concerned to see that the money advanced is wanted for any purpose of the Act, or that no more than is wanted is raised.

In construing this section, sect. 39 must be borne in mind, which expressly prohibits the payment of capital money to fewer than two persons as trustees of a settlement, unless the settlement otherwise provides; and, taking the two sections together, it seems to follow, that, in the absence of any special direction in the settlement, a sole personal representative of the last surviving or continuing trustee cannot give a good discharge for capital money under of the Act.

[Indemnity
and reim-
bursement.]

25. Sects. 41 & 43 supply the usual indemnity and reimbursement clauses for the trustees of the settlement.

[Protection
of trustees.]

26. By sect. 42, the trustees of a settlement, or any of them, are not liable for giving any consent, or for not making, bringing, taking, or doing any such application, action, proceeding, or thing, * as they might make, bring, take, or do; and in case of purchase of land with capital money arising under the Act, or of an exchange partition, or lease, are not liable for adopting any contract made by the tenant for life, or bound to enquire as to the propriety of the purchase, exchange, partition, or lease, or answerable as regards any price, consideration, or fine, and are not liable to see to or answerable for the investigation of the title, or answerable for a conveyance of land, if the conveyance purports to convey the land in the proper mode, or liable in respect to purchase-money paid by them by direction of the tenant for life to any person joining in the conveyance as a conveying party, or as giving a receipt for the purchase-money or in any other character, or in respect of any other money paid by them by direction of tenant for life on the purchase, exchange, partition, or lease.

(*m*) See *Re Duke of Marlborough's Settlement*, 1866, W. N. 1885, p. 136.

Under this section the trustees are under no liability if they stand by and take no active part while the tenant for life is exercising his powers, but it is conceived that the indemnity given by this section to the trustees only holds good so long as they have not actual notice that the tenant for life is acting fraudulently or even improperly. At any rate, trustees, who with the knowledge that the tenant for life is committing a fraud upon his powers take no active steps for the protection of the remaindermen, relying on this section, would be acting most imprudently, and would have little reason to complain if they were made personally liable for any loss arising from their negligence.

It will be observed that trustees in order to have the benefit of this section where land is brought into the settlement upon a purchase, exchange, partition, or lease, must see that the conveyance purports to convey the land in the proper mode, but they are not bound to do more than take care that the deed on the face of it is properly drawn, and is duly executed by the conveying parties, and that the person to whom the purchase-money is paid by the direction of the tenant for life properly joins in the conveyance. [Trustees must see that conveyance is in the proper form.]

27. By sect. 44, if at any time a difference arises between a tenant for life and the trustees of the settlement, respecting the exercise of any of the powers of the Act, or respecting any matter relating thereto, the Court may, on the application of either party, give such directions respecting the matter in difference, and respecting the costs of the application, as the Court thinks fit. [Differences between tenant for life and trustees.]

28. By sect. 55, the powers conferred by the Act are exercisable from time to time, and in exercising the powers the tenant for life * and trustees may [* 569] respectively execute, make, and do, all necessary and proper deeds, instruments and things.

29. By sect. 57, sub-sect. (1), nothing in the Act is to preclude a settlor from conferring on the tenant for life, or the trustees of the settlement, any powers additional to or larger than those conferred by the Act; but by sub-sect. (2), any such additional or larger powers are to operate and be exercisable in the like manner and with all the like incidents, effects, and consequences, as if they were conferred by the Act unless a contrary intention is expressed in the settlement. [Additional powers.]

30. By sect. 60, where a tenant for life, or a person having the powers of a tenant for life under the Act, is an infant, or an infant would, if he were of full age, be [Tenant for life an infant.]

a tenant for life, or have the powers of a tenant for life, the powers under the Act may be exercised on his behalf by the trustees of the settlement, and if there are none, then by such person and in such manner as the Court, on the application of a testamentary or other guardian or next friend of the infant, either generally or in a particular instance, orders. Under this section the Court in Ireland refused, where an infant was entitled to an undivided share of land, to appoint one of his co-owners to exercise on his behalf the powers of the Act, but required the appointment of an independent person (*m*). The Court in directing the mode of sale under this section can order it to be made out of Court (*n*).

[Tenant for
life a married woman.]

31. By sect. 61, sub-sect. (1), the foregoing provisions of the Act do not apply in the case of a married woman; but by sub-sect. (2), a married woman entitled for her separate use, or entitled under any statute for her separate property, or as a *feme sole*, is without her husband, to have the powers of the Act; and by sub-sect. (3), where she is entitled otherwise than as aforesaid, she and her husband together are to have the powers. By sub-sect. (4), the provisions of the Act referring to a tenant for life extend to a married woman entitled to property as her separate estate or as a *feme sole*, and this brings the case of an infant married woman so entitled within sect. 60, and her powers can during infancy be exercised by the trustees of the settlement. But if the married woman is an infant married to a man of full age, and the property does not belong to her as her separate property or as a *feme sole*, a question arises whether the powers of the Act can be exercised during her infancy. For in that case, by sub-sect. (4) of sect. 61, the provisions of the Act re-
[* 570]
ferring to a tenant for life extend to * the married woman and her husband together, and as she and her husband together have the powers of a tenant for life, the case does not seem to fall within sect. 60, which applies only where the person having the powers is an infant. The case put appears to be a *casus omissus* from the Act.

[Trust or
direction for
sale.]

32. Where the settlement contains a trust or direction for the sale of the property, the rights and powers of the trustees and tenant for life stand upon a different footing, and are governed by the independent en-

(*m*) *Re Greenville Estate*, 11 L. R. Ir. 138.

(*n*) *Re Price*, 27 Ch. D. 552.

actment contained in the 63rd section (o). The construction of this section is somewhat obscure, and the extent to which the powers of trustees were affected by it was a question of grave difficulty; but by the Settled Land Act, 1884, the powers given by the 63rd section of the Act of 1882 to tenants for life or other persons having limited interests are not to be exercised without the leave of the Court, which leave is to be given by order naming the persons to exercise the powers, and until such an order is made and registered as a *lis pendens*, it seems clear that the trustees may execute all trusts and powers reposed in them by the settlement as if the Settled Land Acts had not been passed, while after an order has been made and registered and so long as it remains in force the powers of the trustees are suspended, so far as relates to any purpose for which leave is given by the order to exercise a power conferred by the Act of 1882. Under these circumstances no conflict can now arise, under sect. 63, between the trustees and the tenant for life as to the exercise of their powers, and it seems unnecessary to consider what is the proper construction of the section in this respect.

33. Where the powers of the Act are exercisable and any necessity arises for trustees of the settlement for the purposes of the Act, they are by sect. 63 defined to be "the persons, if any, who are for the time being under the settlement trustees for sale of the settled land, or having power of consent to, or approval of, or control over the sale, or if under the settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of the Act."

34. By sub-sect. (2) of sect. 63, the provisions of the Act referring to a tenant for life, and to a settlement, and to settled land, are to extend to cases under that section with certain exceptions, of which the following are the material ones for the present purpose.

* (α). Capital money is not to be applied in [* 571] the purchase of land unless expressly authorized by the settlement in the case of capital money arising thereunder from sales or other dispositions of the settled land, but may, in addition to any other mode of application authorized by the Act, be applied in any mode in which capital money arising under the settlement from

(o) As to this section and the extent to which the powers given by the settlement to trustees are affected by it and the Settled Land Act, 1884, see Chap. xxiii, s. 2, v.

any such sale or other disposition is applicable thereunder, subject to any consent required or direction given by the settlement with respect to the application of trust money of the settlement.

(b). Capital money and the securities in which the same is invested shall not for any purpose of disposition, transmission, or devolution, be considered as land unless the same would, if arising under the settlement from a sale or disposition of the settled land, have been so considered, and shall be held in trust for and shall go to the same persons successively in the same manner, and for and on the same estates, interests and trusts, as the same would have gone, and been held, if arising under the settlement from a sale or disposition of the settled land, and the income of such capital money and securities shall be paid or applied accordingly.

(c). Land of whatever tenure acquired under the Act by purchase, or in exchange, or on partition, shall be conveyed to and vested in the trustees of the settlement, on the trusts, and subject to the powers and provisions which, under the settlement or by reason of the exercise of any power of appointment or charging therein contained, are subsisting with respect to the settled land, or would be so subsisting if the same had not been sold, or as near thereto as circumstances permit, but so as not to increase or multiply charges or powers of charging.

[Commission
for sale.]

35. Where settled property had been put up for sale by auction by the tenant for life under the Act, but withdrawn for want of a sufficient offer, and was afterwards sold by private contract on the same day, it was held that the trustees were at liberty to pay out of the purchase moneys one commission for conducting the sale, including the conditions of sale, and also commission for deducing the title and perusing and completing the conveyance according to the scale of charges contained in Schedule 1, Part I. to the general order under the Solicitors' Remuneration Act, 1881; and also the costs occasioned by the concurrence in the sale of the tenant for life's mortgagees, and a proper sum to the auctioneer for his charges (p).]

* CHAPTER XXIII. [* 572]

THE POWERS OF TRUSTEES.

THE powers of trustees are either *General* or *Special*; the former, such as by construction of law are incident to the office of trustee *virtute officii*; the latter, such as are conferred *vi terminorum*, i. e., by the settlor himself by an express proviso in the instrument creating the trust.

SECTION I.

OF THE GENERAL POWERS OF TRUSTEES.

1. In a Court of *law* the trustee, as the absolute proprietor, may of course exercise all such powers as the legal ownership confers; but in *equity* the *cestui que trust* is the absolute owner, and the question we have to consider in this place is, how far the trustee may deal with the estate without rendering himself responsible in the *forum* of a Court of equity. Powers of trustees at law distinguished from their powers in equity.
2. With respect to the *simple* trust, as the trustee is a mere passive depositary, he can in equity neither take any part of the profits, nor exercise any dominion or control over the *corpus*, except at the instance of the *cestui que trust*. General rule as to powers of trustees in simple trusts.
3. In the *special* trust the authority of the trustee is, as a *general* rule, equally limited except so far as the execution of the trust itself may invest him with a proprietary power, and the duties thus prescribed to him the trustee is bound strictly to pursue without swerving to the right hand or to the left. In special trusts.
4. But, *under particular circumstances*, the trustee is held capable of exercising the discretionary powers of the *bona fide* proprietor; for the trust estate itself might otherwise be injuriously affected. The necessity of the moment may demand immediate action, while the sanction of the parties who are beneficially interested could * not be procured without great in- Exceptions.

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convenience (as where the *cestuis que trust* are a numer-

ous class), or perhaps could not be obtained at all (as where the *cestuis que trust* are under disability, or not yet in existence). The alternative of consulting the Court would always be attended with considerable expense, and, it may be, an expense wholly disproportioned to the importance of the occasion, and perhaps in the meantime the opportunity might be lost. It is therefore evidently in furtherance of the *cestuis que trust's* own interest, that, where the circumstances of the case require it, the trustee should be at liberty to exercise a reasonable discretionary power (*q*). But a trustee for adults should not take any proceeding without consulting his *cestuis que trust*; and if he do, and the proceeding is disavowed by them, he may have to pay the costs (*r*).

Notice of trustee's intention to *cestui que trust*.

5. Where the trust is not definite and precise, and it is doubtful what ought to be done under the trust, it is said that the trustee may *give notice to the cestui que trust of his intention* to do a particular act, and that unless the *cestui que trust* interferes to stop it, the Court might well hold the trustee not to be liable for doing the act (*s*).

Validity of an act without suit.

6. It is a rule of equity, that what is compellable by suit, or would have been ordered by the Court is equally valid if done by the trustee *without suit*, i. e., without the sanction of the Court (*t*). The difficulty with which the trustee has to struggle is the danger of assuming that the Court, on application to it, would view the matter in the same light in which he regards it himself (*u*)¹.

7. Trustees, to avoid circuity, may dispense with

(*q*) See *Angell v. Dawson*, 3 Y. & C. 317; *Darke v. Williamson*, 25 Beav. 622; *Harrison v. Randall*, 9 Hare, 407; *Forshaw v. Higginson*, 8 De G. M. & G. 827; *Ward v. Ward*, 2 H. L. Cas. 784.

(*r*) *Bradby v. Whitechurch*, W. N. 1868, p. 81.

(*s*) *Life Association of Scotland v. Siddal*, 3 De G. F. & J. 74 *per* L. J. Turner.

(*t*) *Lee v. Brown*, 4 Ves. 369, *per Cur.*, *Earl of Bath v. Bradford*, 2 Ves. 590, *per* Lord Hardwicke; *Cook v. Parsons*, Pr Ch. 185, *per Cur.*; *Inwood v. Twyne*, 2 Eden, 153, *per* Lord Northington; *Hutcheson v. Hammond*, 3 B. C. C. 145; *per* Buller, J.; *Terry v. Terry*, Gilb. 11, *per* Lord Cowper; *Shaw v. Borrer*, 1 Keen, 576, *per* Lord Langdale; *Seagram v. Knight*, 2 L. R. Ch. App. 630; *Gilliland v. Crawford*, 4 I. R. Eq. 42, *per Cur.* [*Brown v. Smith*, 10 Ch. D. 377.] The same rule holds also at law, see *Co. Lit.* 171, a.

(*u*) See *Forshaw v. Higginson*, 3 Jur. N. S. 476.

¹ A trustee is entitled to instructions and directions from the Court, *Loring v. Steineman*, 1 Met. 207; *Attorney-General v. Moore*, 4 C. E. Green, 502.

forms, the observance of which would only lead to expense. If, for instance, the transfer of a sum of stock be secured to trustees of a settlement and they have power by the settlement to sell out the fund and invest on mortgage, they need not insist on a transfer of the stock *in specie* for the purpose of immediately selling out and *investing the proceeds on mortgage, but if they have the mortgage ready may take the value of the stock and hand it over to the mortgagor (*v*). So trustees having a power to lay out a certain sum in the purchase of an annuity for A. B., may pay the sum to A. B. direct without going through the form of purchasing the annuity (*w*).

Matter of form may be dispensed with.

8. Where the legal estate is vested in trustees in trust for one person *for life*, with remainders over to others, it would be natural to suppose that the rights in equity as between the tenant for life and the remaindermen would be the same as those at law between a legal tenant for life and legal remaindermen. It is, however, now clearly settled, that whatever may be the legal liability of a legal tenant for life in respect of *permissive waste* (*x*), the trustee cannot (where there is no special clause of management) interfere with the possession of an equitable tenant for life who neglects to repair (*y*).

Repairs.

9. In other respects the rights in equity must, it is conceived, be governed by those at law. Thus a legal tenant for life may cut timber for the purpose of repairs (*z*), though he may not cut timber to sell it and apply the produce (*a*), or to repay himself the outlay in repairs (*b*); and similarly the trustee may, it is conceived, as against the remainderman, cut timber for necessary repairs, if the tenant for life will consent to an

Legal rights.

Equitable rights.

(*v*) See *Pell v. De Winton*, 2 De G. & J. 20; *George v. George*, 35 Beav. 382.

(*w*) *Messeena v. Carr*, 9 L. R. Eq. 260.

(*x*) *Powys v. Blagrave*, 4 De G. M. and G. 458, and cases there cited by Lord Cranworth; *Harnett v. Maitland*, 16 M. & W. 257. Now by 36 & 37 Vict. c. 66, where there is any conflict between the rules of Equity and the rules of Common Law, the rules of Equity are to prevail.

(*y*) *Powys v. Blagrave*, Kay 495; 4 De G. M. & G. 448; and see *Re Skingley*, 3 Mac. and G. 221; *Gregg v. Coates*, 23 Beav. 33.

(*z*) Co. Lit. 54 b.

(*a*) Co. Lit. 53 b. [But now by the Settled Land Act 1882, s. 35, a tenant for life, whether legal or equitable, may, with the consent of the trustees of the settlement, or an order of the Court, cut and sell timber ripe and fit for cutting, but three-fourths of the net proceeds are to be retained in settlement.]

(*b*) *Gower v. Eyre*, G. Coop. 156; and see *Duke of Marlborough v. St. John*, 5 De G. & Sm. 181.

Repairs and
improve-
ments.

application of income towards repairs in making use of the timber. The repairs by a tenant for life, however, substantial and lasting, are his own voluntary act, and do not arise from any obligation, and he cannot claim any charge for them upon the inheritance (c). Nor [before the Settled Land Act, 1882, would] the Court [* 575] at his instance direct *lasting* * *improvements* to be made (d); and though it was said by the Court in one case that the rule might not be absolutely without exception, as if there were a settled estate, and a fund directed to be laid out in the purchase to the same uses, it might be more beneficial to the remainderman that part of the trust fund should be applied to prevent buildings on the settled estates from going to destruction, than that the whole should be laid out in the purchase of other lands (e), yet an extraordinary case was requisite to create such exception (f). [But where trustees having monies in their hands directed to be invested in lands to be strictly settled, entered into an agreement for purchase of an estate, but the farm buildings, and cottages on the property were out of repair, the Court sanctioned the application of 1000*l.* out of the monies in their hands in repairing, improving, and rebuilding the farm buildings and cottages (g).

[Under
Settled Land
Act.]

10. Now by the Settled Land Act, 1882, sect. 26, the tenant for life may, with the approval of the trustees of the settlement, or the approval of the Court as the case may require, according as the money to be expended is in the hands of the trustees or in Court, expend any capital money arising under the Act in any of the improvements specified in sect. 25, of the Act (h).

And as under sect. 59, an infant entitled in possession to land is for the purposes of the Act to be deemed tenant for life thereof, and by sect. 60, the powers of an infant tenant for life may be exercised on his behalf by the trustees of the settlement, or if there are none

(c) *Hibbert v. Cooke*, 1 S. & S. 552; *Caldecott v. Brown*, 2 Hare, 144; and see *Bostock v. Blakeney*, 2 B. C. C. 653; *Hamer v. Tilsley*, Johns. 486; *Dent v. Dent*, 30 Beav. 363; *Floyer v. Banks*, 8 L. R. Eq. 115; *Gilliland v. Crawford*, 4 I. R. Eq. 35; *Re Leigh's Estate*, 6 L. R. Ch. App. 887.

(d) *Nairn v. Majoribanks*, 3 Russ. 582.

(e) *Caldecott v. Brown*, 2 Hare, 145, *per* Sir J. Wigram; and see *Re Barrington's Estates*, 1 J. & H. 142.

(f) *Dunne v. Dunne*, 3 Sm. & G. 22; *Dent v. Dent*, 30 Beav. 363.

[(g) *Lord Cowley v. Wellsley*, 46 L. J. N. S. Ch. 869.]

[(h) As to payment out of capital money for improvements under the Agricultural Holdings (England) Act, 1883, see s. 29 of the Act, and *ante*, p. 563.

by the nominees of the Court, all proper improvements may be effected under the Act, notwithstanding the infancy of the beneficial owner.

11. Independently of the powers of the Settled Land [Generally.] Act] a trustee holding an estate for the benefit of a person absolutely entitled, but incapable from infancy or otherwise to give directions, may make necessary repairs, but he must not go beyond the necessity of the case, as by *ornamental improvements*, or the expense will not be allowed (*i*).¹ The trustees of a will were to permit the testator's son to have "the use and enjoyment" of a house, and were "empowered" during the son's "occupation," to make "repairs" * and [* 576] Lord Romilly, M.R., held that the trustees were to keep the house in a *habitable* state, but not to make *ornamental* repairs (*k*). Where a mansion house was dilapidated at the date of the testator's will, and he empowered his trustees "to keep all the buildings in good repair, and to make such improvements by draining, walling, *building*, liming or manuring, as they should think proper," the trustees had no power to *rebuild* the mansion house (*l*). But under a power to "improve the estate by erecting farm-houses and outbuildings, or by draining and planting," it was held that the trustees could erect agricultural cottages (*m*). And where the trustees of a term of 1000 years were specially authorized to keep the premises in good repair and "*generally to superintend the management*" of the estate, the Court held that the latter words conferred a general power without limit, that is, according to the discretion of the trustee, and allowed the sums expended by them in erecting and repairing farm-houses and buildings, in draining, fencing, sinking wells, putting up pumps, constructing a bridge, and forming, repairing, and altering roads (*n*). If trustees, without any special power to authorize it, lay out money in improving the estate (as in building a villa upon ground intended to be building ground, and which object they are advised will be promoted by the erection of the villa), they cannot justify the expenditure, but on the other hand, the

(*i*) *Bridge v. Brown*, 2 Y. & C. C. C. 181; and see *Attorney-General v. Geary*, 3 Mer. 513; *Gilliland v. Crawford*, 4 I. R. Eq. 35.

(*k*) *Maclaren v. Stainton*, M. R. March 14, 1866, MS.

(*l*) *Bleazard v. Whalley*, 2 Eq. Rep. 1093; see *ante*, p. 537.

(*m*) *Lord Rivers v. Fox*, 2 Eq. Rep. 776.

(*n*) *Bowes v. Earl of Strathmore*, 8 Jur. 92.

¹ *Sohier v. Eldredge*, 103 Mass. 345; *Kearney v. Kearney*, 3 C. E. Green, Ch. 59.

cestuis que trust cannot take the benefit and repudiate the whole outlay, but the trustees will be liable only for the loss to the estate (o). [And where the mansion house had been burnt down and the trustee applied a large sum, in addition to the insurance monies, in restoring the mansion house, the Court was of opinion that it had no jurisdiction to order a sale or mortgage of the settled estates to raise the amount of the outlay, or to authorize the expenditure, for the restoration, of monies which were subject to a trust for re-investment in land; but it appearing that the estate had been benefited to the full amount of certain funds in Court, which had arisen from the sale of part of the settled estates, Kay, J., sanctioned the application of those funds towards recouping the trustee, on the ground that the trustee having *bonâ fide* expended money for building on the estate, under a reasonable expectation that the Court would sanction the expenditure, and having [* 577] improved the estate to * the full amount of the funds in Court, might be recouped the amount so expended (p).] If the trust be to make repairs out of the *rents*, and the trustees borrow money to make the repairs, and then repay themselves out of the rents, they will not be allowed the interest on the money borrowed, for the trust was to apply the rents after they had accrued (q).

[Allowances
to tenant for
life.]

[12. Where trustees of a term are authorized to make improvements on the trust property, and to raise the sums required by mortgaging the hereditaments comprised in the term, or out of the rents, issues, and profits, and subject to the term the property is strictly settled, the tenant for life is entitled to have the amount of income applied by the trustees in permanent improvements raised out of the corpus of the estates (r).

Where there was no power to manage or cultivate the real estate, and a farm was in hand, and no tenant could be found, the Court allowed £1,000, part of the personalty which was held on the same trusts as the realty, to be advanced to the tenant for life, who was one of the trustees, on his bond, he undertaking to expend it in stocking, taking, and cultivating the farm to the satisfaction of his co-trustee (s).

(o) *Vyse v. Foster*, 8 L. R. Ch. App. 309, affirmed 7 L. R. H. L. 318.

[(p) *Jesse v. Lloyd*, 48 L. T. N. S. 656.]

[(q) *Fazakerley v. Culshaw*, 19 W. R. 793.]

[(r) *Re Marquess of Bute*, 27 Ch. D. 196.]

[(s) *Re Household*, 27 Ch. D. 553.]

13. By the Improvement of Land Act, 1864 (*t*), trustees in the *actual possession or receipt of the rents or profits* of lands are enabled, by the 24th section, to apply for and make, in conformity with the provisions of the Act, the several improvements mentioned in the 9th section, such as drainage, reclamation of land, erection of farm buildings, planting, &c. Land Improvement Act.

14. Where an estate was devised to A. and his heirs upon trust to settle on B. for life, subject to impeachment of waste, remainder to C. for life, without impeachment of waste, remainder to C.'s first and other sons in tail, and before any settlement was executed the trustee, with the concurrence of B. and C., cut down timber which showed symptoms of decay, Sir. L. Shadwell said "he considered the timber to have been cut by the authority of the trustee, who * had a [* 578] superintending control over the estate; that it was not a wrongful act; and that the effect of it must be the same as if it had been done with the sanction of the Court" (*u*). And in a later case (*v*) the Court seemed to think that a tenant for life, impeachable for waste, would not be chargeable with interest during his own life as to such timber felled by him as the Court would have ordered to be cut, but that the *onus* would be on the tenant for life to make out that such was the case. Cutting timber.

[15. Now by the Settled Land Act, 1882, sect. 35, a tenant for life impeachable for waste may, with the consent of the trustees of the settlement or an order of the Court, cut and sell timber ripe and fit for cutting, but three-fourth parts of the net proceeds of the sale are to be set aside as capital money arising under the Act. [Settled Land Act.]

16. In the case of instruments coming into operation after the 31st December, 1881, under which an infant, not being a married woman is beneficially entitled to the possession or receipt of the rents and profits of land or hereditaments corporeal or incorporeal, large [Management of land and receipt and application of income during minority.]

(*t*) 27 & 28 Vict. c. 114. Extended by 33 & 34 Vict. c. 56, to building and improvement of mansions; [and by 40 & 41 Vict. c. 31, to the construction and erection of reservoirs and other works of a permanent character for the supply of water; and by the Settled Land Act, 1882, s. 30, to all improvements authorized by that Act, see sect. 25. In *Re Dunn's Settled Estate*, W. N. 1877, p. 39, it was held that the sum to be charged under 33 & 34 Vict. c. 56, was not confined to two years' rental of the particular estate on which the mansion was to be built, but extended to two years' rental of all the estates comprised in the settlement.]

(*u*) *Waldo v Waldo*, 7 Sim. 261; and see *Gent v. Harrison*, Johns. 517; *Earl Cowley v. Wellesley*, 1 L. R. Eq. 656.

(*v*) *Bagot v. Bagot*, 2 New Rep. 297.

powers of management during the minority of the infant have, unless a contrary intention is expressed in the instrument, been provided by the Conveyancing and Law of Property Act, 1881. Sect. 42 of that Act enacts that :—

(1). If and as long as any person who would but for this section be beneficially entitled to the possession of any land is an infant, and being a woman is also unmarried, the trustees appointed for this purpose by the settlement, if any, or if there are none so appointed, then the persons, if any, who are for the time being under the settlement trustees with power of sale of the settled land, or of part thereof, or with power of consent to or approval of the exercise of such a power of sale, or if there are none, then any persons appointed as trustees for this purpose by the Court, on the application of a guardian or next friend of the infant, may enter into and continue in possession of the land; and in every such case the subsequent provisions of this section shall apply.

(2). The trustees shall manage or superintend the management of the land, with full power to fell timber or cut underwood from time to time in the usual course for sale, or for repairs or otherwise, and to erect, pull down, rebuild, and repair houses, and other buildings and erections, and to continue the working of mines, minerals, and quarries which have usually been worked, [* 579] and to * drain or otherwise improve the land or any part thereof, and to insure against loss by fire, and to make allowances to and arrangements with tenants and others, and to determine tenancies, and to accept surrenders of leases and tenancies, and generally to deal with the land in a proper and due course of management; but so that, where the infant is impeachable for waste, the trustees shall not commit waste, and shall cut timber on the same terms only, and subject to the same restrictions, on and subject to which the infant could, if of full age, cut the same.

(3). The trustees may from time to time, out of the income of the land, including the produce of the sale of timber and underwood, pay the expenses incurred in the management, or in the exercise of any power conferred by this section, or otherwise in relation to the land, and all outgoings not payable by any tenant or other person, and shall keep down any annual sum, and the interest of any principal sum, charged on the land.

(4). The trustees may apply at discretion any income

which, in the exercise of such discretion, they deem proper, according to the infant's age, for his or her maintenance, education, or benefit, or pay thereout any money to the infant's parent or guardian, to be applied for the same purposes.

(5). The trustees shall lay out the residue of the income of the land in investment on securities on which they are by the settlement, if any, or by law, authorized to invest trust money, with power to vary investments; and shall accumulate the income of the investments so made in the way of compound interest, by from time to time similarly investing such income and the resulting income of investments; and shall stand possessed of the accumulated fund arising from income of the land and from investments of income on the trusts following (namely):

(i). If the infant attains the age of twenty-one years, then in trust for the infant;

(ii). If the infant is a woman and marries while an infant, then in trust for her separate use, independently of her husband, and so that her receipt after she marries, and though still an infant, shall be a good discharge; but

(iii). If the infant dies while an infant, and being a woman without having been married, then, where the infant was, under a settlement, tenant for life, or by purchase tenant in tail or tail male or tail female, on the trusts, if any, declared of the accumulated fund by that settlement; but where no such trusts are declared, or the infant has taken the land from which the accumulated fund * is derived by descent, and [*580] not by purchase, or the infant is tenant for an estate in fee simple, absolute or determinable, then in trust for the infant's personal representatives, as part of the infant's personal estate; but the accumulations, or any part thereof, may at any time be applied as if the same were income arising in the then current year.

(6). Where the infant's estate or interest is in an undivided share of land, the powers of this section relative to the land may be exercised jointly with persons entitled to possession of, or having power to act in relation to, the other undivided share or shares.]

17. Conservators of public works and similar *quasi trustees* are authorized to apply the funds under their control in *opposing* a bill in Parliament, the effect of which if passed would be injurious to the interests confided to them. "Every trustee," said Lord Cottenham, "is entitled to be allowed the reasonable and proper

Trustees are authorized to oppose a bill in Parliament to prejudicial *cestuis que trust*.

expenses incurred in protecting the property committed to his care. But if they have a right to protect the property from immediate and direct injury, they must have the same right where the injury threatened is indirect, but probable" (w).

Applications
to Parlia-
ment.

18. On the other hand, *quasi* trustees, such as those before referred to, are not entitled to apply the funds of an existing undertaking in or towards the expense of obtaining *other or larger* Parliamentary powers (x).

As to insur-
ance.

19. A *trustee* would, it is conceived, under special circumstances, and in due course of management, be justified in *insuring* the property (y)¹; but where there is a tenant for life, he could not be advised to do so out of the income without the tenant for life's consent. But if an annuity and a policy on the life of the *cestui que vie* be made the subject of a settlement, it is implied that the trustee is to pay the premiums out of the income (z). A *mortgagee* is not regarded as a *trustee*; and if, in the absence of any stipulation on the subject, he effects an insurance, it is on his own account, and he cannot claim to be entitled to the premiums under just allowances. It is the same as if a lessor or lessee in-
[* 581] sured, in * which case the other would have no claim to the benefit of the policy (a).

[Direction
by testator
to carry on
trade.]

[20. In a recent case in Ireland (b), it has been held that a general bequest in the will of a trader to trustees upon trust to permit his wife to carry on his business so long as she should remain a widow was equivalent to a direction to the trustees to carry it on themselves with the property employed by the testator him-

(w) *Bright v. North*, 2 Ph. 220; *Queen v. Norfolk Commissioners of Sewers*, 15 Q. B. 549; *Attorney-General v. Andrews*, 2 Mac. & G. 225; *Attorney-General v. Eastlake*, 11 Hare, 205; [*Attorney-General v. Mayor of Brecon*, 10 Ch. D. 204; *Regina v. White*, 14 Q. B. D. 358, reversing S. C. 11 Q. B. D. 309.]

(x) *Attorney-General v. Andrews*, 2 Mac. & G. 225; *Vance v. East Lancashire Railway Company*, 3 K. & J. 50; *Attorney-General v. Guardians of the Poor of Southampton*, 17 Sim. 6; *Attorney-General v. Corporation of Norwich*, 16 Sim. 225; *Stevens v. South Devon Railway Company*, 13 Beav. 48.

(y) *Ex parte Andrews*, 2 Rose, 412; and see *Fry v. Fry*, 27 Beav. 146.

(z) *Darcy v. Croft*, 9 Ir. Ch. Rep. 19.

(a) *Dobson v. Land*, 8 Hare, 216; and see *Ex parte Andrews*, 2 Rose, 410; *Phillips v. Eastwood*, Ll. & G. t. Sugden, 289. [But see 23 & 24 Vict. c. 145, s. 11; since repealed and its place supplied by 44 & 45 Vict. c. 41, s. 19, sub-sect. (1), (ii).]

[(b) *Gallagher v. Ferris*, 7 L. R. Ir. 489; and see *Re Johnson*, 15 Ch. D. 548; *Strickland v. Symons*, 26 Ch. D. 245; *Boylan v. Fay*, 8 L. R. Ir. 374.]

¹ *Lerow v. Wilmarth*, 9 Allen, 382.

self in the trade, and that the assets to the extent of such property were liable to pay for goods supplied to the testator's widow for the trade carried on by her; and where a will contained a direction that the testator's business was to be carried on for a specified time, without any actual disposition of his property beyond a direction for the payment by the executors of certain legacies, the executors were held to be entitled, so long as the business was carried on for the purposes of the will, to the free use and occupation of the business premises and the fixed plant and machinery without paying any rent for the same (c).]

Where a testator gave all his real and personal estate to trustees upon trust for sale and conversion, and empowered them to carry on his business and employ therein all the capital invested therein at his death, and to increase or abridge the business and his capital therein, an equitable mortgage by the trustees of the testator's real estate to raise monies which were applied for the purposes of the business was held to be within their powers; *Re Dimmock*, 52 L. T. N. S. 494.

21. An executor is allowed a reasonable time for breaking up the testator's establishment, and a period of two months in one case was considered not to be excessive (d)¹. Executors, as a general rule, do not pay legacies until the expiration of one year from the testator's death; but this is a rule of convenience; and, therefore, if the assets be clearly sufficient for payment of debts and legacies, there is nothing to prevent the executors from discharging the legacies before the expiration of the year (e).

Breaking up the testator's establishment.

22. An executor may appropriate a legacy without the necessity of a suit, where the appropriation is such as the Court itself would have directed (f).

Appropriation.

23. A trustee may expend sums of money for the protection and safety, or support, of a *cestui que trust* who is incapable of taking care of himself, but the more prudent course is to apply to the Court (g).

Maintenance.

[(c) *Re Cameron*, 26 Ch. D. 19.]

(d) *Field v. Peckett* (No. 3), 29 Beav. 576.

(e) *Angerstein v. Martin*, 1 T. & R. 241, *per* Lord Eldon; *Pearson v. Pearson*, 1 Sch. & Lef. 12, *per* Lord Redesdale; and see *Garthshore v. Chalie*, 10 Ves. 13.

(f) *Hutcheson v. Hammond*, 3 B. C. C. 128, see 145, 148; and see *Cooper v. Douglas*, 2 B. C. C. 231.

(g) *Duncombe v. Nelson*, 9 Beav. 211; and see *Chester v. Rolfe*, 4 De G M & G. 798, and cases there cited.

¹ This matter is generally regulated by statute in the United States.

Out of interest.

[Recent Act.]

[* 582] * 24. If a *legacy* be left to an infant, and the Court, upon application, would, from the inability of the parent to support his child, order *maintenance* out of the *interest*, the trustee, should he make advances for that purpose without suit, would be allowed them in his account (*h*). In the case of *Andrews v. Partington* (*i*); Lord Thurlow refused to indemnify the trustee; but the authority of that decision has been repeatedly denied, and may be considered as overruled (*k*). And the maintenance of each year need not be confined to the interest of that year, but the trustee will be allowed in his accounts to set off the gross amount of the maintenance against the gross amount of the interest (*l*). [Now by the 43rd sect. of the Conveyancing and Law of Property Act, 1881, trustees under instruments coming into operation either before or after the commencement of the Act, holding property for an infant, either for life or for any greater interest, and whether absolutely, or contingently on his attaining twenty-one, or on the occurrence of any event before his attaining that age, are expressly authorized to apply the income of that property, or any part thereof, for or towards the maintenance, education, or benefit of the infant, or to pay it to the infant's parent or guardian for that purpose, and this whether there be any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education or not; and the trustees are to accumulate the residue of the income in the way of compound interest for the benefit of the person who ultimately becomes entitled to the property from which the accumulations arise, with power at any time to apply such accumulations as income of the current year (*m*).]

Under this section the trustees have a discretionary power to apply past accumulations of income in payment of past maintenance (*n*).

25. The section applies only if and so far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and is to have effect subject to the terms of the instrument, but

(*h*) *Sisson v. Shaw*, 9 Ves. 285; *Prince v. Hine*, 26 Beav. 634.

(*i*) 3 B. C. C. 60.

(*k*) See *Sisson v. Shaw*, 9 Ves. 288; *Maberly v. Turton*, 14 Ves. 499; *Lee v. Brown*, 4 Ves. 369; *Ex parte Darlington*, 1 B. & B. 241; *Cotham v. West*, 1 Beav. 381.

(*l*) *Carmichael v. Wilson*, 3 Moll. 79; *Edwards v. Grove*, 2 De G. F. & J. 210.

[(*m*) 44 & 45 Vict. c. 41, s. 43.]

[(*n*) *Re Pitts' Settlement*, W. N. 1884, p. 225.]

a direction to trustees to accumulate the income of the shares of children who are entitled contingently on their attaining twenty-one, or being daughters attaining that age or * marrying, and to pay the [* 583] same to them as and when their presumptive shares become payable is not the expression of such a contrary intention (o).

26. The corresponding section in Lord Cranworth's Act, the wording of which was very similar, was held not to apply to the case of a gift absolute in the first instance but liable to be defeated in the event of the legatee not attaining twenty-one. In such a case the accumulations of income were held to belong to the infant's estate notwithstanding his death under age (p). It may be doubted whether that case was not intended to be covered by the enactment, but it does not fall within the strict letter of it, and no distinction can be drawn in this respect between the language of the corresponding sections in Lord Cranworth's Act and the recent Act. [Income of gift absolute in form but liable to be defeated.]

27. Where the infant was entitled contingently on his attaining twenty-one, or on some event before his attaining that age, to a legacy carrying interest in the meantime, the power of maintenance in Lord Cranworth's Act applied (q), as does also the power under the recent Act; but where a further contingency is involved in the gift, as in addition to attaining twenty-one the contingency of surviving a particular person, the case does not come within the sections of either of the Acts, and neither the trustees nor the Court can apply the income for maintenance, and there is no obligation to accumulate (r). [Income of contingent gift.]

28. Another question which arises under this section is, whether an infant is entitled to maintenance out of the income of property to which he is entitled contingently on his attaining twenty-one, where, independently of the section, the infant could never have become entitled to the income; as for instance in the case of a pecuniary legacy given by a person not the parent or *loco parentis* to an infant contingently on his attaining twenty-one. This question is not free from difficulty having regard to the state of the law prior to the recent enactment and to the language of the section. By Lord Cranworth's Act where an infant was contingently

[(o) *Re Thatcher's Trusts*, 26 Ch. D. 426.]

[(p) *Re Buckley's Trusts*, 22 Ch. D. 583.]

[(q) *Re Cotton*, 1 Ch. D. 232.]

[(r) *Re Judkin's Trusts*, 25 Ch. D. 743.]

* 15 LAW OF TRUSTS.

entitled to property, the trustees were empowered to apply towards the maintenance and education of such infants "the whole or any part of the income to which such infant might be entitled in respect of such property;" and it was held in *Re George* (s), that this power did not extend to the case of a contingent pecuniary legacy not carrying interest until the time of payment. [* 584] In this state of the law, the Conveyancing * and Law of Property Act, 1881, was passed, and sect. 43 omitted the words "to which such infant might be entitled in respect of such property," but notwithstanding the variation in the language of the late Act, it has been held by the Court of Appeal affirming *Kay, J.*, that the section does not apply to the case of a pecuniary legacy given to an infant contingently on his attaining twenty-one, followed by a residuary gift. In *L.J. Cotton's* opinion, there is in such a case no property held in trust for an infant within the meaning of the section until the time arises for severing the legacy from the residue, *i. e.*, until the infant attains twenty-one; while in *L.J. Fry's* opinion, the gift of residue which, independently of the section, carries the income accruing during the minority to the residuary legatee is a sufficient expression of a contrary expression within sub-sect. (3), to take the case out of the Act. (t).

[Where property held for an infant for life.]

29. The section of the late Act gives rise to this further difficulty; the power applies to the case of "property held in trust for an infant for life," but the surplus accumulations are to be held "for the benefit of the person who ultimately becomes entitled to the property from which the same arise." It is difficult without construing the word "property" in different senses in the same section to attach any other meaning to these words than that the accumulations are to be added to and go with the corpus of the property, and it is conceived that this is the result of the clause, although its effect is to deprive an infant, who has an absolute life interest, of the income accrued during his minority, and not required for his maintenance. The difficulty no doubt arose from the language of Lord Cranworth's Act (which did not apply to a life interest) being copied without the necessary modification, and until the point has been decided it will be prudent, in any instrument

[(s) 5 Ch. D. 837.]

[(t) *Re Dickson*, 28 Ch. D. 291, 297; affirmed 9 March, 1885; but see *Re Judkin's Trust*, 25 Ch. D. 743. *Re Dickson*, is now reported on appeal in 29 Ch. D. 331.

giving a life interest to an infant, to insert a maintenance clause and exclude the operation of the section.

30. It is to be observed that cases may easily arise in which the trustees would be in a position to exercise either the powers of sect. 42, or those of sect. 43 of the late Act, as for instance if under an instrument coming into operation since the 31st December, 1881, real estate were vested in them in trust for an infant for life, and the trustees had a power of sale or of consenting to the exercise of a power of sale; and as the accumulations of income would or might go in different channels according as the trustees were acting under the one section or the other, they would be placed in a position of * difficulty. It is conceived that if it were [* 585] requisite for the trustees to exercise any of the special powers of sect. 42, they would be treated as having entered into possession under that section, and that the accumulations of income would go accordingly, but that in a simple case where the trustees merely received the income as legal owners and had no occasion to exercise any of the powers of sect. 42, the accumulations would go as directed by sect. 43. It would, however, be prudent, in framing any instrument under which the difficulty could arise, to provide for the disposition of the accumulations.]

[Conflicting powers under the recent Act.]

31. Where the amount of the legacy is inconsiderable, as 100*l.*, the Court would, in the absence of other means, direct maintenance to the child out of the *principal* itself (*u*); the executor, therefore, who, under similar circumstances but without the authority of the Court, breaks in upon the capital, would not be liable, on the *cestuis que trust's* coming of age, to account for the expenditure (*v*). But where payments of this kind, which are not strictly authorized, are made by executors or trustees, and the propriety of them is questioned in a suit, and there is a deficiency of assets, the costs of suit will have priority over the allowances to the executors or trustees (*w*). Where the legacy

(*u*) *Ex parte Green*, 1 J. & W. 253; *Ex parte Chambers*, 1 R. & M. 577; *Ex parte Swift*, *Ib.* 575; *Re Mary England*, *Id.* 499; *Harvey v. Harvey*, 2 P. W. 21; *Ex parte Hays*, 3 De G. & Sm. 485. In *Re Howarth*, 8 L. R. Ch. App. 415, the Lords Justices held that the Court had jurisdiction to order maintenance, where there were no other means, out of the *corpus* of an infant's freehold estate; and in *De Witte v. Palin*, 14 L. R. Eq. 251, V. C. Malins allowed maintenance to be raised by a charge on reversionary property.

(*v*) *Barlow v. Grant*, 1 Vern. 255; *Carmichael v. Wilson*, 3 Moll. 79; *Bridge v. Brown*, 2 Y. & C. C. 181, 189.

(*w*) *Robinson v. Killey*, 30 Beav. 520.

was not more than 300*l.*, Sir W. Grant determined that the trustee had exceeded his duty, and said his *impression* was, that the rule had been *never* to permit trustees of their own authority to break in upon the capital (*x*); but the case of *Barlow v. Grant*, which is clearly to the contrary, must have escaped his Honour's recollection (*y*). The *general rule* is, however not to break into capital for maintenance, and where the legacy is considerable, as 1000*l.*, or the like, as the Court itself would most probably not order the application of part of the principal, the trustee would not be safe in exceeding of his own authority the amount of the interest (*z*).

Maintenance
where father
alive.

[* 586] * 32. Where the father of an infant is alive, trustees should, in granting maintenance, bear in mind that the Court never allows a *father* maintenance out of his children's property without a previous inquiry as to his ability to maintain them himself (*a*). The term *ability*, however, is relative to the position of the father and children; and maintenance has been allowed to a father who had 6000*l.* a year (*b*). And an express declaration in the instrument of trust, or a previous contract, as in the case of a marriage settlement to which the father is a party, may confer on the father a right to have maintenance for his children out of the settlement funds (*c*). But the decisions in this respect have gone as far as can be justified upon principle (*d*).

[Where there was a power of maintenance in the usual form in the discretion of the trustees, and the trustees without exercising any discretion in the matter paid the whole income to the father of the infant, it was held that the father's estate must account for the income received by him (*e*).

(*x*) *Walker v. Wetherell*, 6 Ves. 473.

(*y*) See also *Prince v. Hine*, 26 Beav. 636.

(*z*) *Barlow v. Grant*, 1 Vern. 255, *per* Lord Guildford; *Davies v. Austen*, 1 Ves. jun. 247; S. C. 3 B. C. C. 178; *Beasley v. Magrath*, 2 Sch. & Lef. 35.

(*a*) See now 23 & 24 Vict. c. 145, s. 26; [since repealed and its place supplied by 44 & 45 Vict. c. 41, s. 43.]

(*b*) *Jervoise v. Silk*, 1 G. Coop. 52; *Ex parte Williams*, 2 Coll. 740; *Culbertson v. Wood*, 5 I. R. Eq. 23, see 41.

(*c*) *Mundy v. Lord Howe*, 4 B. C. C. 223; *Meacher v. Young*, 2 M. & K. 490; *Stocken v. Stocken*, 4 Sim. 152, 2 M. & K. 489, 4 M. & Cr. 95; *White v. Grane*, 18 Beav. 571; *Ransome v. Burgess*, 3 L. R. Eq. 773; *Newton v. Curzon*, 16 L. T. N. S. 696.

(*d*) *Thompson v. Griffin*, Cr. & Ph. 321, *per* Lord Cottenham; [*Wilson v. Turner*, 22 Ch. D. 521;] and see *Re Kerrison's Trusts*, 12 L. R. Eq. 422, the case of a voluntary settlement.

(*e*) *Wilson v. Turner*, 22 Ch. D. 521.]

Where the father had borrowed money to enable him [Past main-
to keep his infant children at school and was unable to tenance.]
repay the debt, the Court allowed him to be recouped
the amount so borrowed as an allowance for past main-
tenance (*f*).]

33. It was formerly much doubted whether after the death of the father maintenance should be granted to the mother so long as she continued a widow without an inquiry as to her ability (*g*). But it was ruled that *where she had married again* there should be no inquiry as to ability, the second husband being, it was said, under no liability to maintain his wife's children (*h*). It has been since settled that no inquiry as to the mother's ability will be directed even during her widowhood (*i*); and as a widow is undoubtedly liable at law to maintain her children (*k*), the direction * of the inquiry cannot be regarded [* 587] as depending upon the *legal liability*. It would seem to follow that the enactment rendering a husband liable to maintain his wife's children by a former marriage (*l*) ought not to make (and it is believed that it has not in fact made) any alteration in the practice of the Court of granting maintenance where the mother has married again without any inquiry as to ability.

[34. Where a testator left property to the value of 10,000*l*. a year to be accumulated for twenty-one years, and directed that the accumulations should be laid out in the purchase of lands which, after the expiration of the twenty-one years, were to be held for A. for life, and after his death for his sons in strict settlement, and A.'s income was insufficient to enable him to bring up and educate his infant sons in a manner suitable to their prospective positions in life, V.C. Malins allowed him 2,700*l*. a year out of the income of the property, with liberty to apply for an increased allowance if necessary when the children grew older (*m*). But in a subsequent case in Ireland where the circumstances were similar, the Court refused to follow the decision of V.C. Malins, and held that where there is an imperative trust to accumulate, it is the duty of the Court to

[*(f)* *Davey v. Ward*, 7 Ch. D. 754.]

[*(g)* As to the mother's right to be recouped for past maintenance of a child, see *Re Cottrell's Estate*, 12 L. R. Eq. 566.

[*(h)* *Billingsly v. Critchet*, 1 B. C. C. 268.

[*(i)* *Douglas v. Andrews*, 12 Beav. 310; and see the note, p. 311.

[*(k)* 43 Eliz. c. 2, s. 6; 4 & 5 W. 4, c. 76, s. 56.

[*(l)* 4 & 5 W. 4, c. 76, s. 57.

[*(m)* *Havelock v. Havelock*, 17 Ch. D. 807; and see *Bennett v. Wyndham*, 23 Beav. 521; and S. C. 4 De G. F. & J. 259.]

carry out the testator's intention, and that the Court has no discretion to allow maintenance out of the income (*n*); and the Irish decision seems to be in accordance with sound principle.

[Interests of third parties protected.]

35. Where an accumulation has been directed by a testator, and the Court allows maintenance out of the accumulations, the order should be framed so as to protect the interests of third parties by directing the interests of the infants in any legacy or share of residue to be held as a security for recouping any diminution in the accumulations (*o*).

Where an infant was entitled, contingently on her attaining twenty-one or marrying, to a large property, the Court sanctioned a scheme for providing for her past and future maintenance, by effecting a policy of assurance payable on her death before either attaining twenty-one or marrying under that age, and mortgaging the policy and charging the infant's contingent interest to secure the necessary advances and compound [* 588] interest, but it was expressly * provided that the interest of any person other than the infant was not to be affected (*p*).

Advancement out of capital.

36. A part of the capital may be sunk by a trustee without the direction of the Court for the *advancement* of a child, where the same sums if expended for *maintenance* would not have been allowed (*q*).

[*(n)* *Kemmis v. Kemmis*, 13 L. R. Ir. 372; affirmed 15 L. R. Ir. 90; following *Shaw v. M'Mahon*, 8 Ir. Eq. R. 584.]

[*(o)* *Re Colgan*, 19 Ch. D. 305; see this case and *Re Arbuckle*, 2 Set. on Dec. 4th Ed. 726, for form of order providing for the recoupment.]

[*(p)* *Re Bruce*, 30 W. R. 922; and see *Re Tanner*, 53 L. J. N. S. Ch. 1108; 51 L. T. N. S. 507, as to adopting a similar course for securing the other persons interested where an advance is required for an infant whose interest is only contingent.]

[*(q)* *Swinnock v. Crisp*, Freem. 78; *Walker v. Wetherill*, 6 Ves. 477; and see *Ex parte M'Key*, 1 B. & B. 405. As to what purposes will fall under the description of advancement, see *Boyd v. Boyd*, 4 L. R. Eq. 305; *Roper-Curzon v. Roper-Curzon*, 11 L. R. Eq. 452; *Re Gore's Settlement Trusts*, W. N. 1876, p. 79; *Taylor v. Taylor*, 20 L. R. Eq. 155. In the last case an advancement by way of *portion* was said to be something given by a parent to establish his child in life, a provision for him, and not a casual payment. Under portions would be ranked the following, viz., sums advanced on *marriage*, on setting up a child in *business* or putting him into a *profession*, buying the *goodwill* of a business and giving *stock-in-trade*, or supplying *further capital* for carrying on the business, or paying the *entrance at an Inn of Court* with a view to the Bar, or buying a *commission* and providing the *outfit*. So a *large sum* given to a child in *one payment* might be presumed in the absence of evidence to be an advancement by way of portion. But the qualities of a portion would not attach to *small sums* paid by a father to a child whether an infant or adult, or to

37. But a trustee cannot apply part of the principal towards the advancement of the child where the legacy is subject to a limitation over in favour of a stranger, for in such a case the Court itself could not make an order to that effect.

Advancement when there is a limitation over.

Thus in *Lee v. Brown* (r), where a testatrix gave 100*l.* to trustees upon trust to apply the produce to the maintenance and education of A. B., and when he should attain twenty-one to transfer to him the capital, but in case he died under that age the testatrix gave the legacy to his brother and sister equally, Lord Alvanley said, "It certainly was not competent under his trust to the executor, nor could he, *if he had applied*, have obtained permission from this Court, to advance any part of the capital of the legacy in putting the child out in the world; for *if it had been such a case that the Court would have authorized the act that was done*, I desire to be understood that it would be considered as properly done; for the principle is now established, that if an executor does without application what the Court would have approved, he shall not be called to account, and forced to undo that merely because it was done without application" (s). But where an infant was entitled, on a * contingency, and at a certain time but which had not arrived there was a power of advancement, and the trustee took upon himself the risk as against the person entitled if the contingency did not happen, and applied part of the capital for the advancement of the infant, he was allowed it in his account as between him and the infant who in the event became entitled (t).

38. And where legacies were given to children payable at twenty-one or marriage, with a limitation over on the death of any child before attaining twenty-one or marriage, *not in favour of a stranger, but for the benefit of such of the children as should attain twenty-one or marry*, a trustee, who had paid a premium on the apprenticeship of a child who died under twenty-one, was allowed it by the Court (u). The case turned upon

Where there are cross limitations amongst the children.

temporary assistance in the discharge of his debts, or to payment of his travelling expenses, as a passage to India, or to the payment of a fee to a special pleader, which would come rather under preliminary education than advancement. But in the recent case of *Re Blockley*, 29 Ch. D. 250, Pearson J. dissented from the view that a sum given by a father to his son to enable him to pay his debts could not be treated as an advancement.

(r) 4 Ves. 362.

(s) *Ib.* 369.

(t) *Worthington v. M'Craer*, 23 Beav. 81.

(u) *Franklin v. Green*, 2 Vern. 137. That the limitation over

the same principle as where a legacy is given to a class, all or some of whom must take the fund absolutely, when, as all have an equal chance of survivorship, the individuals of the class will be ordered maintenance even before their shares in the fund have become actually vested (*v*). This power is exercised by the Court, but cannot be exercised by trustees without the authority of the Court, nor can the Court itself make such an order in a summary way without the institution of a suit (*w*).

[Where consent of bankrupt tenant for life required.]

[39. Where there is a power of advancement with the consent of the tenant for life, and the tenant for life becomes a bankrupt, his power of consenting is not extinguished, but can only be exercised with the consent of his trustee in bankruptcy acting under the directions of the Court of Bankruptcy (*x*).]

General power of advancing tenant for life.

40. Where trustees had a power to apply a moiety of a trust fund in or towards the preferment or advancement of the tenant for life, or *otherwise for his benefit*, in such a manner as they should in their discretion think fit, it was held that they might apply the moiety in payment of the debts of the tenant for life, the interest of which absorbed nearly the whole of his income and the principal of which he was unable to pay out of his own resources (*y*). [So a power of applying the capital for the benefit and advancement in the world of the tenant for life, coupled with words showing that the [* 590] power * of advancement was a large one, has been held to justify applications of the trust funds for the benefit of the tenant for life which were not strictly advancements (*z*).]

Debts barred by the Statute of Limitations.

41. An executor has never been held responsible for paying a debt due and owing from the testator's estate, the remedy for which has been barred by the Statute of Limitations; and upon the same principle he may retain his own debt though barred (*a*). But an execu-

was for the benefit of the children is not mentioned in the report. but appears from Reg. Lib.

(*v*) See *Rop. Leg.* chap. xx. s. 5; *Greenwell v. Greenwell*, 5 Ves. 194; *Cavendish v. Mercer*, cited *Ib.*; *Brandon v. Aston*, 2 Y. & C. C. C. 30.

(*w*) *Re Breeds' Will*, 1 Ch. D. 226.

[(*x*) *Re Cooper*, 27 Ch. D. 565.]

[(*y*) *Lowther v. Bentinck*, 19 L. R. Eq. 166; and see *Re Breeds' Will*, 1 Ch. D. 226; *Re Gore's Settlement Trusts*, W. N. 1876, p. 79.]

[(*z*) *Re Brittlebank*, 30 W. R. 99.]

(*a*) *Stahlschmidt v. Lett*, 1 Sm. & G. 415; *Hill v. Walker*, 4 K. & J. 166; *Hunter v. Baxter*, 3 Giff. 214; *Dring v. Greetham*, 1 Eq. Rep. 442; *Louis v. Rumney*, 4 L. R. Eq. 451.

tor would not be at liberty to pay such a debt after a decree for the administration of the testator's estate, for from that time any other creditor, or even a legatee, specific, pecuniary, or residuary, may plead the statute in taking the accounts (*b*), except to the debt of a plaintiff in a creditors' suit, to which debt the defendant, the executor, did not plead the statute by his statement of defence, and on the basis of which the decree has been made (*c*). If after a decree neither the executor nor the parties beneficially interested before the Court plead the statute, the Court will not set up the statute on behalf of absent parties, but if the *executor* omits to plead the statute, it is at his own risk (*d*).¹

42. It sometimes happens that the deceased made some promise, written or verbal, to subscribe a certain sum for the promotion of some "charitable or public purpose." If nothing has been done in consequence of such promise, the executor or administrator must treat the promise as voluntary, and therefore null. But if other persons have acted on the faith of the promise and would suffer loss if it were not observed, the executor or administrator, it is conceived, would be justified in giving it effect (*e*). Promise of subscription.

[43. If an estate is vested in trustees and there is not for the time being any beneficial owner of the rents and profits, the trustees are the proper persons to apply to the Court under the 23rd sect. of the Settled Estates Act, 1877, to exercise the powers conferred by the Act (*f*).] [When trustees may apply under Settled Estates Act.]

44. A trustee may, under circumstances, release or compound a debt (*g*). But if a trustee release or compound a debt without * some sufficient ground [* 591] in justification (*h*), or, if he sell the debt for a grossly Power to release or compound debts.

(*b*) See *Fuller v. Redman*, 26 Beav. 614; *Shewen v. Vanderhorst*, 1 R. & M. 347; 2 R. & M. 75; *Dring v. Greetham*, 1 Eq. Rep. 442.

(*c*) *Adams v. Waller*, 35 L. J. N. S. Ch. 727; *Fuller v. Redman* (No. 2), 26 Beav. 614; *Briggs v. Wilson*, 5 De G. M. & G. 12; S. C. 2 Eq. Rep. 153; *Ex parte Dewdney*, 15 Ves. 496.

(*d*) *Alston v. Trollope*, 2 L. R. Eq. 205; S. C. 35 Beav. 466; and see *Dring v. Greetham*, 1 Eq. Rep. 442.

(*e*) See *Cooper v. Jarman*, 3 L. R. Eq. 98; *Baxter v. Gray*, 3 Man. & G. 771; *Shallcross v. Wright*, 12 Beav. 558.

[(*f*) *Vine v. Raleigh*, W. N. 1883, p. 128.]

[(*g*) *Blue v. Marshall*, 3 P. W. 381; and see *Ratcliffe v. Winch*, 17 Beav. 216; *Forshaw v. Higginson*, 8 De G. M. & G. 827.

(*h*) *Jevon v. Bush*, 1 Vern. 342; *Gorge v. Chansey*, 1 Ch. Rep. 125; *Wiles v. Gresham*, 5 De G. M. & G. 770. A trustee is not liable for omitting to compound; *Ex parte Ogle*, 8 L. R. Ch. App. 715, *per Cur.*

¹ *Bacot v. Hayward*, 5 S. C. 441.

inadequate consideration (*i*), he will clearly be answerable to the *cestuis que trust* for the amount of the *de-vastavit*. Executors under wills *executed after the 28th August, 1860*, [were by Lord Cranworth's Act] expressly authorized "to accept any composition, or any security, real or personal, for any debts due to the deceased, and to allow any time for payment of any such debts as they should think fit, and also to compromise, compound, or submit to arbitration all debts, accounts, claims and things whatsoever relating to the estate of the deceased, without being responsible for any loss to be occasioned thereby" (*k*). [But this section has been repealed and its place supplied by the Conveyancing and Law of Property Act, 1881, which as to executorships and trusts constituted or created either before or after the commencement of the Act provides by sect. 37, that (1) "an executor may pay or allow any debt or claim on any evidence that he thinks sufficient"; (2) "an executor, or two or more trustees acting together, or a sole acting trustee where, by the instrument, if any, creating the trust, a sole trustee is authorized to execute the trusts and powers thereof, may, if and as he or they think fit, accept any composition, or any security, real or personal, for any debt, or for any property, real or personal, claimed, and may allow any time for payment of any debt, and may compromise, compound, abandon, submit to arbitration, or otherwise settle, any debt, account, claim, or thing whatever relating to the testator's estate or to the trust," and may execute and do all such releases and things as may seem expedient without being responsible for any loss occasioned by anything done in good faith. But as regards trustees the section is subject to any contrary intention expressed in the instrument creating the trust (*l*).¹

In exercising the powers of this section in a case where there are several trustees, it is conceived that *all the trustees* must "act together," except in cases in

(*i*) *Re Alexander*, 13 Ir. Ch. Rep. 137.

(*k*) 23 & 24 Vict. c. 145, s. 30. [This section was held not to be confined to claims in the nature of debts, but to extend to claims of legatees, *Re Warren*, 53 L. J. N. S. Ch. 1016; 51 L. T. N. S. 561; 32 W. R. 916.]

[(*l*) 44 & 45 Vict. c. 41, ss. 37, 71.]

¹ Fiduciaries are authorized by statute in many of the United States to refer or compromise claims either in favor of or against the estate. Such statutes are constitutional. Perry on Trusts (3rd ed.) § 482. The compromises they may make will be ratified and confirmed by the courts. *Clark v. Cordis*, 4 Allen, 466.

which, independently of the section, a majority of the trustees are by law capable of binding the minority (*m*). The object of the section was not to enable some of the trustees to act without the concurrence of their co-trustees.

* It will be observed that the powers of this [* 592] section are only exercisable by a sole acting trustee in cases where a sole trustee is by the instrument, if any, creating the trust "authorized to execute the trusts and powers thereof," but by the 38th section, as to trusts created by instruments coming into operation after the 31st December, 1881, any trust or power vested in two or more trustees jointly, in the absence of a contrary intention in the instrument creating the trust or power, may be exercised or performed by the survivor for the time being, and it seems to follow that in the case of trusts falling within this section the powers of sect. 37 may be exercised by a sole surviving trustee.

This section has largely extended the powers of executors and trustees, and it would seem that in future the only question will be whether the executors or trustees have acted in good faith in relation to any of the matters authorized by the section.

Independently of the section, executors have a fair [Discretion
discretion whether they will press a debtor for payment, of executors.] and will not be held liable for wilful neglect or default if they have exercised their discretion honestly and fairly in giving time to a debtor although loss may result from the delay (*n*).]

45. Executors and trustees of a will when they have Settlement discharged the funeral and testamentary expenses, debts with one and legacies, may come to a final account with one of residuary legatee. the residuary legatees separately, and if such residuary legatee be paid only what is his fair share at the time, he will not be made to account to the other residuary legatees, if the undistributed part afterwards become depreciated or lost (*o*).

46. Where the residue consists of a great variety of Appropriation securities, the question arises whether the trustees in of the absence of any special power can *virtute officii*, residue, where infants are concerned, divide the residue by appropriating some securities to one residuary legatee and other securities to another, but so that the distribution is a fair one according to the market price of the

[(*m*) As to a majority binding a minority in charity trusts, see *ante*, p. 259 ; and see *post*, p. 597.]

[(*n*) *Re Owens*, 47 L. T. N. S. 61.]

(*o*) *Peterson v. Peterson*, 3 L. R. Eq. 111.

day of the funds so appropriated. The *Court* can make such an apportionment, for in a suit guardians *ad litem* of the infants are appointed and are heard on their behalf to protect their interests; but out of Court where the voice of the infants cannot be heard, it would be unsafe for trustees to make such an apportionment on their own responsibility. However, where trustees are directed to invest the infants' share on any particular [* 593] securities, they might accept securities of * the nature prescribed at the market price, as the transaction when resolved would be the payment of so much money, and the investment of it by the trustees in the requisite securities. Where there are no special powers, the trustees should turn the whole of the irregular species of property into money and divide the proceeds.

Release of equity of redemption.

45. Trustees of an *equity of redemption* of lands mortgaged for more than their value, may, it is conceived, release the equity of redemption to the mortgagee, rather than be made defendants to a foreclosure suit, the cost of which, so far as incurred by themselves, would fall upon the trust estate.

Whether trustees mortgagees can release part of the land in mortgage.

46. Where trustees are *mortgagees* they are often requested to release part of the land from the security, in order to enable the mortgagor to deal with it for his own convenience. Where the value of the land is not excessive as compared with the debt, it would, of course, be a gross breach of trust to deteriorate the security. But suppose the value of the part left in mortgage to be (say) double the amount of the debt, may the trustees release the residue? It is presumed that trustees can never justify the abandonment of any part of the security on the mere ground of consulting the convenience of the mortgagor; and they must be prepared to show that the act was calculated under the circumstances to promote the interest of the *cestuis que trust*. But if the mortgagor be ready to pay off the mortgage on a transfer of the security, unless the trustees will consent to release, and the existing mortgage, even when confined to the narrower parcels, is a clearly beneficial one and the value still abundantly ample, the trustees would surely incur no responsibility by acceding to the arrangement (*p*). The prevailing opinion of conveyancers appears to be that where trustees have a power of investing on mortgage and of varying securities (which a power of investing on mortgage implies) the transaction will be considered as tantamount to re-

(*p*) See *Whitney v. Smith*, 4 L. R. Ch. App. 513; *Pell v. De Winton*, 2 De G. & J. 13.

payment of the mortgage money, and reinvestment by the trustees on a mortgage of the hereditaments retained as a security, and that the purchaser of the released hereditaments is not bound to see to the sufficiency of the new security, or that the acceptance of the new security does not involve a breach of trust (q).

[47. It is conceived that although trustees holding independent securities from the same mortgagor may have the right to consolidate them, it is not imperative upon them to do so, but that they *may deal [* 594] with the securities independently, or allow one or more of them to be redeemed, without incurring any liability for loss which may arise from the subsequent depreciation in the other securities. They should, however, satisfy themselves before parting with any of the securities, or allowing any of them to be redeemed, that the margin of value on those which are retained is then sufficient to justify a present advance to the amount remaining due to the trustees upon such securities.]

[Whether bound to consolidate mortgages.]

48. Trustees of a settled estate with a power of sale and reinvestment may, it is conceived, sell part of the estate to pay off a mortgage affecting the estate though not mentioned in the settlement, for this in substance is a reinvestment, and *à fortiori* if the trustees have a power of investing on real securities until a purchase can be found, they can sell part of the estate and apply the proceeds in taking a transfer of the mortgage, provided it be an adequate security.

Discharge of a mortgage on a settled estate.

49. Trustees for sale of a limited interest in an estate (as a remainder), or of an aliquot part of the estate (as an undivided one-fourth), may concur with the other parties in a sale of the whole estate for one entire sum, and may agree afterwards as to the apportionment of the purchase money, and if the parties cannot agree the apportionment will be made by the Court (r). But otherwise, if there be not any intelligible principle upon which the apportionment can be made (s).

Sale of limited interests.

50. A trustee may reimburse himself a sum of money *bonâ fide* advanced by him for the benefit of the *cestui que trust*, or even for his own protection in the execution of his office. For, "As it is a rule," said Lord Chancellor King, "that the *cestui que trust* ought to

Reimbursement of expenses on account of the trust.

(q) See Davidson's Preced. vol. ii. p. 835, 3rd ed.; Dart's V. & P. vol. ii. p. 612, 5th ed.

(r) Clark v. Seymour, 7 Sim. 67; Rede v. Oakes, 32 Beav. 555; see Earl Powlett v. Hood, 5 L. R. Eq. 115, and *ante*, p. 430.

(s) Rede v. Oakes, 32 Beav. 555; 10 Jur. N. S. 1246; S. C. 4 De G. J. & S. 505.

save the trustee harmless, so within the reason of that rule, when the trustee has honestly and fairly, without any possibility of being a gainer, laid down money by which the *cestui que trust* is discharged from being liable for the whole money lent, or from a plain and great hazard of being so, he ought to be repaid" (t).

Power of trustees for sale to clear the estate.

51. A trustee for sale has been held to be justified in applying part of the purchase money in paying off a charge without satisfaction of which the purchaser refused to complete, and which the trustee was professionally advised was still subsisting, though the charge itself was open to doubt (u).

Power to grant leases.

[* 595] *52. A trustee of lands may grant a reasonable husbandry lease (v), in the fair management of the estate (w). But he has no power to demise where it is a simple trust, and the *cestui que trust* is in possession, except he do it with the *cestui que trust*'s concurrence. And *prima facie* a trustee for sale would not be justified in granting a lease (x). And though a trustee may grant a farming lease, it does not follow that he could grant a *mining lease*, for the latter is *pro tanto* a destruction of the *corpus* (y).

[Trustees having power to grant leases to "any person or persons" may lease to a limited company (z).

By sect. 43 of the Agricultural Holdings (England) Act, 1883 (a), when, by any instrument, a lease of a holding is authorized to be made, provided that the best rent or reservation in the nature of rent is reserved, on a lease to the tenant of the holding, it shall not be necessary, in estimating such rent or reservation, to take into account against the tenant the increase (if any) in the value of such holding arising from improvements made or paid for by him.]

Powers of directors, &c.

53. The managers of a trading company or partnership have no power, whatever the necessity of the case, to borrow money beyond the capital prescribed by the

(t) Balsh v. Hyham, 2 P. W. 453.

(u) Forshaw v. Higginson, 8 D. G. M. & G. 827.

(v) See Naylor v. Arnitt, 1 R. & M. 501; [Fitzpatrick v. Waring, 11 L. R. Ir. 35;] Bowes v. East London Waterworks Company, Jac. 324; Drohan v. Drohan, 1 B. & B. 185; Middleton v. Dodswell, 13 Ves. 268; [and cf. Ferraby v. Hobson, 2 Phil. 255.] But see *contra*, Wood v. Patteson, 10 Beav. 541; *Re Shaw's Trust*, 12 L. R. Eq. 124.

(w) See Attorney-General v. Owen, 10 Ves. 560.

(x) Evans v. Jackson, 8 Sim. 217; and see Micholls v. Corbett, 34 Beav. 376.

(y) Wood v. Patteson, 10 Beav. 544.

[(z) *Re Jeffcock's Trusts*, 51 L. J. N. S. Ch. 507.]

[(a) 46 & 47 Vict. c. 61.]

Act or deed of settlement, so as to give the lenders a remedy against the company (b). And where, without any special authority being conferred by the deed of settlement, money is borrowed for launching or enlarging the concern, the managers (though made to pay upon their personal liability under the contract) have no remedy over against the other members of the company (c). But every business must be carried on at either a profit or loss, and as the members of the company take the profit, they must also bear the loss, and therefore if the managers incur debts or expenses by employing labour or ordering goods in the *ordinary course of business*, or borrow money and apply it to these purposes, they must be indemnified in equity by the other members of the company (d).

* 54. Trustees of shares in an unlimited [* 596] Trustees' shares.
Banking Company have no power, unless specially authorized by their settlement, to accept *new shares* allotted to them though issued at a premium (e).

55. By 15 & 16 Vict. 51, s. 32, trustees of *copyholds* Enfranchise-
were empowered on *enfranchisement* to charge the ex-
penses on the estate enfranchised, but this section was repealed by 21 & 22 Vict. c. 94, s. 2, and re-enacted in effect by the 21st section, which authorizes all persons enfranchising to charge the expenses with the consent of the commissioners on the estate. Any enfranchisement of a trust estate should be made to the trustee who has the legal estate, and not to the *cestui que trust* (f).

[56. By the Conveyancing and Law of Property Act, [Enlarging
1881, trustees in receipt of the income in right of a long term
long term, or having the term vested in them in trust into fee.]
for sale, may exercise the powers of the Act for enlargement of the term into a fee simple. The estate in fee simple so acquired is to be subject to all the same trusts, powers, executory limitations over, rights, and equities as the term would have been subject to if it had not been enlarged. But where such long lease-

(b) *Burmester v. Norris*, 6 Exch. 796; *Ricketts v. Bennett*, 4 C. B. 686; and see *Hawtayne v. Bourne*, 7 M. & W. 595; *Hawken v. Bourne*, 8 M. & W. 703.

(c) *Re Worcester Corn Exchange Company*, 3 De G. M. & G. 180; *Ex parte Chippendale*, 4 De G. M. & G. 43; see *Australian, &c. Company v. Mounsey*, 4 K. & J. 733.

(d) *Ex parte Chippendale*, 4 De G. M. & G. 19; *Troup's case*, 29 Beav. 353; *Hoare's case*, 30 Beav. 225.

(e) *Sculthorpe v. Tipper*, 13 L. R. Eq. 232; [and see *Re Morris*, W. N. 1855, p. 31, now reported in 54 L. J. N. S. Ch. 388.]

(f) See *Minton v. Kirwood*, 3 L. R. Ch. App. 614.

holds have been settled in trust by reference to freeholds so as to go along with them as far as the law permits, and at the time of the enlargement the ultimate beneficial interest in the term has not become absolutely and indefeasibly vested, the estate in fee simple is, without prejudice to any conveyance for value previously made, to be conveyed and settled, and devolve in the same manner as the freeholds (*g*).

[Compensation for agricultural improvements.]

57. By the Agricultural Holdings (England) Act 1883 (*h*), a tenant who has made on his holding certain improvements specified in the schedule to the Act is entitled on quitting his holding at the determination of his tenancy to compensation from the landlord for such improvements to be ascertained as provided by the Act. But by sect. 31, where the landlord is a trustee, the amount of compensation is not to be recoverable from him personally, but is to be charged on and recoverable against the holding only. And by sect. 42 subject to certain provisions as to Crown, duchy, ecclesiastical, and charity lands, a landlord, whatever may be his estate or interest in his holding, may give any consent, make any agreement, or do or have done to him any act in relation to improvements, in respect of which compensation is payable under the Act, as if he were, in the [* 597] * case of an estate of inheritance owner thereof in fee, and in the case of a leasehold possessed of the whole estate in the leasehold.]

Powers of majority of trustees.

58. The general powers allowed to trustees must in a private trust be exercised by all the trustees as a *joint body*, but in *charitable* or *public* trusts the voice of the *majority* will bind the rest, and in certain cases the majority can give effect to their resolution by passing the legal estate under a statutory power (*i*).

Case of suit instituted and a decree made.

59. The powers assigned in the preceding pages to trustees must be taken subject to the qualification, that, if a *suit* has been instituted for the execution of the trust, and a *decree made*, the powers of the trustees are thenceforth so far paralysed that the authority of the Court must sanction every subsequent proceeding (*k*). Thus the trustees cannot commence or defend any action or suit, or interfere in any other legal proceed-

[(*g*) 44 & 45 Vict. c. 41, s. 65; and see 45 & 46 Vict. c. 39, s. 11.]

[(*h*) 47 & 48 Vict. c. 61.]

(*i*) See *supra*, pp. 540, 547.

(*k*) *Mitchelson v. Piper*, 8 Sim. 64; *Shewen v. Vanderhorst*, 2 R. & M. 75; S. C. affirmed, 1 R. & M. 347; *Minors v. Battison*, 1 App. Cas. 428.

ing, without first consulting the Court as to the propriety of so doing (*l*): a trustee for sale cannot sell (*m*): the committee of a lunatic cannot make repairs (*n*): an executor cannot pay debts (*o*), or deal with the assets for the purpose of investment (*p*). But an executor as to a chattel, not the subject of the suit *specifically*, can after decree give a good title to a *bonâ fide* purchaser not having actual notice of the *lis pendens* (*q*), and it is presumed that he can equally, where there is no receiver appointed, sign a valid receipt for any part of the testator's personal estate. But where an administration action has been heard on further consideration, and no subsequent further consideration has been reserved, but general liberty to apply has been given, trustees may exercise their powers without obtaining the sanction of the Court; *Re Mansel*, 52 L. T. N. S. 806; 33 W. R. 727.

60. An action in which a *writ* merely has been issued is distinguishable from one in which a *decree* has been made, for until decree the plaintiff may dismiss his action at any moment, and should he do so, the progress of the trust may have been arrested for no purpose (*r*). However, even in this case the trustees cannot be advised to act without first consulting the Court, and if by acting independently of the Court expenses be incurred which might have * been avoided had [* 598] the trustees applied to the Court, they may be made to bear them personally (*s*).

Case of suit
and no
decree.

61. Even after a *decree* made the trustee is not absolved from the duties imposed by his office. Thus

Duties of executor after
institution of
suit.

(*l*) See *Jones v. Powell*, 4 Beav. 96. The Court is sometimes reluctant to give leave to institute or defend a suit, but holds out that if the trustee or executor acts *bonâ fide* the Court will protect him. The reason for this disinclination no doubt is that the application to the Court is *ex parte*, and is sometimes made a vehicle for multiplying costs. However, the Court frequently gives such leave, and a trustee or executor cannot be advised to commence or defend a suit without, at least, submitting the case to the Court, though no order may be made.

(*m*) *Walker v. Smalwood*, Amb. 676; *Annesley v. Ashurst*, 3 P. W. 282.

(*n*) Anon. case, 10 Ves. 104.

(*o*) *Mitchelson v. Piper*, 8 Sim. 84; *King v. Roe*, L. J. May, 27, 1858, *Irby v. Irby*, 24 Beav. 525; and see *Jackson v. Woolley*, 12 Sim. 13.

(*p*) *Widdowson v. Duck*, 3 Mer. 494; *Bethell v. Abraham*, 17 L. R. Eq. 24.

(*q*) *Berry v. Gibbons*, 8 L. R. Ch. App. 747.

(*r*) *Cafe v. Bent*, 3 Hare, 249; *Neeves v. Burrage*, 14 Q. B. 504.

(*s*) *Attorney-General v. Clack*, 1 Beav. 467; and see *Cafe v. Bent*, 3 Hare, 249.

after a decree in an administration suit an executor was held liable for having allowed a policy of insurance to drop without any sufficient reason (*t*).

SECTION II

THE SPECIAL POWERS OF TRUSTEES.

UPON this branch of our subject we shall consider, *First*, The different kinds of powers; *Secondly*, The construction of powers; *Thirdly*, The effect of disclaimer, assignment of the estate, and survivorship among the trustees; *Fourthly*, The control of the Court over the exercise of powers; [and *Fifthly*, The restrictions on the powers of trustees imposed by the Settled Land Acts.]

I. Of the different kinds of powers.

Powers legal and equitable distinguished.

1. In applying the doctrine of powers to the subject of trusts it may be useful to regard powers as either *legal* or *equitable*: the former, such as operate upon the legal estate, and so are matter of cognizance in Courts of common law; the latter, such as affect the equitable interests only, and so fall exclusively under the notice of Courts of equity. Thus, if lands be limited to the use of A. for life, remainder to B. and his heirs, and a power operating under the Statute of Uses be given to C., the execution of the power works a conveyance of the legal estate; but if lands be limited to the use of A. and his heirs upon trust for B. for life, and after his death for C. and his heirs, and a power not operating under the Statute of Uses be given either to the trustee or to the *cestui que trust*, the execution of such a power will have no effect at law, but will merely serve to transfer the beneficial interest in equity, and may therefore be designated by the name of an equitable power.

Equitable powers, whether annexed to the estate or simply collateral.

2. An *equitable*, the same as a legal power, may be either annexed to the estate or be simply collateral; but whether it shall be taken as the one or the other will [* 599] depend on the question, whether * the donee of the power be possessed of the *equitable*, that is, of the *beneficial* interest or not. Thus, where a testator devised an estate to his *sister* and her heirs forever, upon trust to settle it on such of the descendants of the testator's mother as his *sister* should think fit, and the

(*t*) *Garner v. Moore*, 3 Drew. 277.

devisee having married, the question was raised whether the execution of the power by her, as she was under coverture at the time, was to be considered as valid, Lord Hardwicke held that this was a power *without an interest*, i.e., without any beneficial interest and could therefore be executed by the *feme covert* (u). On the other hand where the legal estate was devised to *trustees* in fee upon trust for an infant *feme covert* for her sole and separate use during her life, and upon trust to permit her by deed or writing executed in the presence of three or more witnesses, notwithstanding her coverture, to dispose of the estate as she should think fit, and the testator died leaving the *feme covert* his heir-at-law, and she, during the continuance of the coverture and infancy, exercised the power by will, Lord Hardwicke, upon the question whether the power had been duly executed, observed, that this was a power *coupled with an interest*, which was always considered different from naked powers: it was admitted that if this execution was to operate on the estate of the infant it might not be good: now this was clearly so, for she had the trust in equity for life, with the trust of the inheritance in her in the meantime, so that this was directly a power over *her own inheritance*, which could not be executed by an infant (v).

[3. In the case of personal estate, however, an infant may exercise a power in gross. Thus, where under a marriage settlement an infant *feme covert*, to whom the income of the settled property was given for her life for her separate use, had, in the events which happened, a general power limited to her of appointing the trust funds, after her death and subject to the interest of her husband, by deed or will, and she exercised the power by deed, and died an infant, it was held by the late M. R. and affirmed by the Court of Appeal, *dissentiente* Cotton, L.J., that the power was well exercised, and the M.R. observed "If it is clearly settled that the first class of powers—powers simply collateral—can be exercised by an infant, there can be no reason why the second class of powers—powers in gross—should not be so exercised when the exercise cannot affect the infant's interest; I can see no sufficient distinction between * the two cases. It can make no difference [*600] that the infant has some interest under the settlement,

[Exercise of powers by infant.]

(u) *Godolphin v. Godolphin*, 1 Ves. 21.

(v) *Hearle v. Greenbank*, 1 Ves. 298; see 306; and see *Blithe's* case. *Freem.* 91; *Penne v. Peacock*, *For.* 43.

so long as that interest cannot be affected by the exercise of the power" (*w*).]

Bare powers,
and powers
coupled with
a trust.

4. Again, powers, in the sense in which the term is commonly used, may be distributed into *mere powers*, and *powers coupled with a trust* (*x*). The former are powers in the proper sense of the word; that is, *not imperative*, but purely *arbitrary*; powers which the trustee cannot be compelled to execute, and which, on failure of the trustee, cannot be executed vicariously by the Court (*y*). The latter, on the other hand, are *not arbitrary*, but *imperative*, have all the nature and substance of a trust, and ought rather, as Lord Hardwicke observed, to be designated by the name of trusts (*z*). "It is perfectly clear," said Lord Eldon, "that where there is a *mere power*, and that power is not executed, the Court cannot execute it. It is equally clear, that wherever a *trust* is created, and the execution of the trust fails by the death of the trustee or by accident, this Court will execute the trust. But there are not only a *mere trust* and a *mere power*, but there is also known to this Court a *power which the party by whom it is given is intrusted and required to execute*; and with regard to that species of power, the Court considers it as partaking so much of the nature and qualities of a trust, that if the person who has the duty imposed upon him does not discharge it, the Court will, to a certain extent, discharge the duty in his room and place" (*a*).

Strict
powers, and
powers
directory.

5. Again, powers have been dealt with by the Court as either of a *strict* or of a *directory* character: the former such as only arise under the exact circumstances prescribed by the settlement;¹ the latter such as being merely *monitory* may be taken with a degree of latitude. Thus, where an advowson was vested in trustees upon trust to elect and present a fit person *within six months* from the incumbent's decease, it was considered that the clause was *directory*, and that the trustees might equally elect and present, although that period had elapsed (*b*).² So, where six trustees were

[*(w)* *Re D'Angibau*, 15 Ch. D. 228; and see *ante*, pp. 37, 38.]

[*(x)* See *Gower v. Mainwaring*, 2 Ves. 89; *Cole v. Wade*, 16 Ves. 43; *Hutchinson v. Hutchinson*, 13 Ir. Eq. Rep. 332.

[*(y)* See *Cowper v. Mantell*, 22 Beav. 231, and cases there cited; and *Re Eddowes*, 1 Dr. & Sm. 395.

[*(z)* *Godolphin v. Godolphin*, 1 Ves. 23.

[*(a)* *Brown v. Higgs*, 8 Ves. 570.

[*(b)* *Attorney-General v. Scott*, 1 Ves. 413, see 415.

¹ *Boorum v. Wells*, 4 Green, Ch. 87; *Loring v. Blake*, 98 Mass. 253.

² *Shalter's App.* 43 Pa. St. 83.

empowered *when reduced to three* to substitute others, and all died but one, it was held competent to the sole survivor to fill up the number (c). * And [* 601] where in the case of twenty-five trustees, the direction was, that *when reduced to fifteen* the survivors should nominate, it was determined by the Court that, although seventeen remained, the survivors were at *liberty* to exercise their power, but that, when reduced to only fifteen, they were *compellable* to do so (d).

6. These were cases of *charitable* trusts, in which it seems a greater latitude of construction is allowed. Charity. But in another case, where the trusts were not charitable, and estates were devised to trustees upon trust to sell "with all convenient speed, and within *five years* after the testator's decease," it was held that these words were directory only, and that the trustees could sell and make a good title, although the five years had expired (e).¹

II. We proceed to consider the *construction* of powers. As the powers of trustees are regulated by the doctrines applicable to powers in general, and as the admirable treatise of Lord St. Leonards is in every one's hands, we shall advert only to some cases of most frequent occurrence.

1. If a power be given to "A. and B. and *their heirs*," it is perfectly clear, that, although the limitation of an *estate* in such terms would so vest it in the grantees that they might convey it to a stranger, and the survivor devise it, the power is not to be construed as intended in like manner to be assignable and devisable (f). Power to "A. and B., and their heirs."

Upon the subject of such a power where it was given *personally*, and unaccompanied by any estate, to A. and B. and their heirs, Lord Chief Justice Wilmot observed, "It is asked What must become of the power upon the death of one of the trustees? It must be considered as a tenancy in common. Had the words been 'their several and respective heirs,' it would have been Chief Justice Wilmot's opinion.

(c) Attorney-General v. Floyer, 2 Vern. 748; and see Attorney-General v. Bishop of Lichfield, 5 Ves. 825; Attorney-General v. Cuming, 2 Y. & C. C. C. 139; but see Foley v. Wontner, 2 J. & W. 245.

(d) Doe v. Roe, 1 Anst. 86.

(e) Pearce v. Gardner, 10 Hare, 287; and see Cuff v. Hall, 1 Jur. N. S. 973.

(f) Cole v. Wade, 16 Ves. 46, per Sir W. Grant.

¹ Shalton's App. 43 Pa. St. 83; Smith v. Kenney, 33 Texas, 283.

clear; and in common parlance, and according to the common apprehension of mankind, when an estate is given to two men and their heirs, no one not illumined with the legal nature of joint-tenancy could ever conceive the estate was to go to the heirs of the survivor. It is equivalent to saying, *With consent of both while they live; but when one dies, that consent shall devolve upon his heir; the heir of the dead trustee shall consent as well as the surviving trustee. One may abuse the power; I will supply the loss of one by his heir, and the loss of both by the heirs of both*" (g). But this was [* 602] where A. and B. had a *mere power, for where A. and B. are trustees of an estate limited to them and their heirs, and the power constitutes an essential part of the trust, it will pass with the estate to the survivor (h).

Townsend v.
Wilson.

In *Townsend v. Wilson* (i) a power of sale was given to three trustees to preserve contingent remainders and their heirs; and it was directed that the money to arise from the sale should be paid into the hands of the trustees or the survivors or survivor of them, and the executors, administrators, or assigns of such survivor, and there was a *power of appointment of new trustees*, with a direction that such appointment should take place as often as any one or more of the trustees should die, &c. One of the trustees died, and it was determined by the Court of Queen's Bench, that the survivors alone were incapable of exercising the power. Lord Eldon was dissatisfied with this decision, and asked, "Did the Court of Queen's Bench consider that the two surviving trustees and the heir of the deceased trustee, were to act together? for it was one thing to say that the survivors could not act until another was appointed; and a different thing to say, the heir of the deceased trustee could act in the meantime" (k). But his Lordship so far bowed to the authority of the decision, that he refused under similar circumstances to compel a purchaser to accept the title (l). In *Townsend v. Wilson* the trustees had not the fee, and the power was not to be executed as part of a trusteeship, and it is therefore no authority against the execution of a trust by the surviving trustees. Indeed, where an estate was devised to three trustees and their respective

(g) *Mansell v. Vaughan*, Wilm. 50, 51.

(h) See *infra*, p. 611.

(i) 1 B. & Ald. 608, 3 Mad. 261; and see *Cooke v. Crawford*, 13 Sim. 91.

(k) *Hall v. Dewes*, Jac. 193; and see *Jones v. Price*, 11 Sim. 557.

(l) *Hall v. Dewes*, Jac. 189.

heirs, upon trust that they and their *respective* heirs should sell, the word "respective" was rejected for surplusage, and it was held that the survivors could make a title (m).

2. In *Hewett v. Hewett* (n), a testator devised his estate to four persons to uses in strict settlement, with a power to the tenants for life, when in actual possession, to cut such trees as the *four devisees to uses, or the survivors or survivor of them* (omitting the words "and the heirs of the survivor") should direct; and all the trustees being dead, the question was whether the power was gone. Lord Henley held, that, upon the construction of the will, the testator intended the power to be co-extensive with the life estates, and that the trustees were interposed, as supervisors only to prevent destruction; and that the office of the trustees was not personal, but such * as might be executed by the Court. He, therefore, considered the power as subsisting, and referred it to the Master to inquire what timber was fit to be cut. The Court, therefore, did not regard the authority to the trustees as a mere power, but as a trust.

3. Where a discretionary *legal power* is expressly limited to "A. and his *assigns*," the grantee or devisee of A., and even a claimant under him by operation of law as an heir or executor, may exercise the power (o); but in a *trust*, if an estate be vested in a trustee upon trust that he, his heirs, executors, administrators or *assigns* shall sell, *etc.*, the introduction of the word *assigns* will not authorize the trustee to assign the estate to a stranger (p), nor, if the assignment be made, will the stranger be capable of exercising the power (q).

4. In a *mortgage*, with a power of sale limited to the mortgagee, his heirs, executors, administrators, and *assigns*, the intention is that the power should go along with, and be annexed to, the security; and therefore, if the mortgage be assigned to a stranger, and the legal estate be conveyed to the stranger or to a trustee for him, the stranger, alone or with the concurrence of the trustee, can give a good legal and equitable title (r); and even if a mortgage be made to A. and B. to secure

(m) *Jones v. Price*, 11 Sim. 557.

(n) 2 Eden, 332, Amb. 508; and see *Bennett v. Wyndham*, 23 Beav. 528.

(o) *How v. Whitfield*, 1 Vent. 338, 339; 1 Freem. 476.

(p) The case of *Hardwick v. Mynd*, 1 Anst. 109, cannot in this respect be supported.

(q) See p. 608.

(r) *Saloway v. Strawbridge*, 1 K. & J. 371; 7 De G. M. & G. 594.

a joint advance, and the power of sale and signing receipts be limited to A. and B., *their heirs and assigns*, it has been held that as the power and the security were plainly meant to be coupled together, and the security enures to the benefit of the survivor (the advance being a joint one), the survivor may also sell (s).

Power indicating personal confidence to "A. and his executors."

5. If a power indicating personal confidence be given to a "trustee and his *executors*," and the executor of the trustee dies having appointed an executor, the latter executor, though by law the executor not only of his immediate testator but also of the trustee, will not, it is said, be so considered for the purposes of the power (t); for a matter of personal confidence is not to be extended beyond the express words and clear intention of the settlor; and in this case, the settlor may have meant the power to be exercised exclusively by the executors, whom the trustee had himself named, and not by a per- [* 604] son who is executor of the trustee * by operation of law only. This however, is a narrow construction, and the liberality of modern times may not improbably hold that, if a power be given to executors, the settlor must be taken to have contemplated generally every one whom the law invests with that character.

Power to "executors" "trustees."

6. A power limited to "executors" or "sons in law" may be exercised by the survivors so long as the plural number remains (u), and if a power be limited to a number of "trustees," we may reasonably conclude that, whether they have any estate or not—i. e. whether the power be an adjunct to the trust or collateral to it, it may be exercised by the surviving trustees. And a power given to "executors" will, if annexed to the executorship, be continued to the single survivor (v)¹; and so a power given to "trustees" will, as annexed to the estate and office, be exercisable by the single survivor (w); but it cannot be exercised by one trustee in the lifetime of the other who has not effectually disclaimed (x). And it has been said that if a power to vary the rights of parties be communicated to the "*trustees for the time being*," it cannot be exercised by a

(s) *Hind v. Poole*, 1 K. & J. 383.

(t) See *Cole v. Wade*, 16 Ves. 44; *Stile v. Tomson*, Dyer, 210, a; Perk. sect. 552; Moore, 61, pl. 172; Sugd. Powers, 129, 8th edit.

(u) Sugd. Powers, 128, 8th edit.

(v) Sugd. Powers, 128, 8th edit.; *Houell v. Barnes*, Cro. Car. 382; *Brassey v. Chalmers*, 4 De G. M. & G. 528, reversing the decision of the Master of the Rolls, 16 Beav. 231.

(w) *Lane v. Debenham*, 11 Hare, 188.

(x) *Lancashire v. Lancashire*, 2 Ph. 664.

¹ *Re Bernstein*, 3 Redf. (N. Y.) 20.

single trustee (*y*). And where there was a trust for sale, but no sale was to be made without the consent of the testator's *sons and daughters*, and he left seven sons and daughters, and one died, it was held that a sale with the consent of the survivors was too doubtful a title to be specifically enforced (*z*)¹.

7. A discretionary power to four trustees "and the survivors of them" cannot, it seems, be executed by the last survivor (*a*); for though a power to trustees may, in general, be held to survive, an intention to the contrary may be fairly inferred: the settlor may be supposed to have said, "I repose a confidence in any two of the trustees jointly, but in neither one of them individually." But if a power be limited to four trustees "and the survivor of them," it may well be argued that, on the death of one, the power may still be exercised by the survivors; for there can be no valid reason why a person who trusted the four jointly, and each of them individually, should refuse to repose a confidence in the survivors for the time being (*b*).

Power to "trustees and survivors."

To "trustees and survivor."

* 8. In a case before Sir J. Leach, a testator [* 605] devised an estate to trustees upon trust as to one moiety for A. for life, remainder to her children at twenty-one, and as to the other moiety for B. for life, remainder to her children at twenty-one, and gave the trustees a power of sale "*during the continuance of the trust.*" A. died, and her children attained twenty-one, and the question was whether the trustees could, under the power, sell the whole estate, the children of B. being infants. The Vice-Chancellor held, that if the children of A. could call for a present conveyance of their moiety it would have the effect of depriving B. and her children of the benefit of the power of sale, and also of the leasing power given to the trustees, for that an undivided moiety could not advantageously be sold or leased, and that the testator must have meant to continue the powers of ownership to the trustees until there were owners competent to deal with the whole estate (*c*).

Trower v. Knightley.

(*y*) *Lancashire v. Lancashire*, 2 Ph. 664.

(*z*) *Sykes v. Sheard*, 2 De G. J. & S. 6.

(*a*) *Hibbard v. Lamb*, Amb. 309. Note, further directions were declared necessary on the death of *either* of the surviving executors, see *Eaton v. Smith*, 2 Beav. 236.

(*b*) See *Crewe v. Dicken*, 4 Ves. 97; in which case it seems to have been assumed that the receipt of the survivors would be a sufficient discharge.

(*c*) *Trower v. Knightley*, 6 Mad. 134; and see *Taite v. Swinestead*, 26 Beav. 525.

¹ *Alley v. Lawrence*, 12 Gray 371.

Power
"during the
continuance
of the trust."

9. But if a power be given to trustees to be exercised "during the continuance of the trust," it cannot be exercised after the time when the trust *ought* to have been completed, though, from the delay of the trustees, it happens that the trust has not in fact been executed (*d*).

Powers
cease when
settlement is
at an end.

10. And though the power be not confined expressly to the continuance of the trust, yet the power is gone when the objects of the trust have been fully exhausted, but not before (*e*).¹

[But the mere fact of the beneficial interest in the property having become vested in persons, all of whom are *sui juris*, will not put an end to the power, if, on the construction of the instrument creating the power, the intention appears that it should still be exercisable, and the power in its creation was not obnoxious to the rule against perpetuities (*f*).

[Within
what time
power must
be exercised.]

If a power of sale be given in general terms, the question arises within what limit of time it must be exercised. This will depend on the nature of the limitations contained in the will or settlement; for when, by reason of the expiration or cesser of the limitations, the absolute interests come into existence, the power is considered to be at an end. And as, for the settlement to be valid, the limitations must become absolute within [* 606] the period allowed by the rule * against perpetuities, a power which is to continue in existence until the interests are absolute will also be valid. If the settlement contains in the first instance absolute limitations of interest, a power of sale given for the purpose of division among the beneficiaries will not be invalid, but it must be exercised within a reasonable time (*g*).]

Joint powers.

11. Powers given to trustees must be exercised by them jointly, but an act by one trustee, with the sanc-

(*d*) Wood v. White, 2 Keen, 664. It was determined on appeal that the trusts in this case were still in being, 4 M. & Cr. 460.

(*e*) Wolley v. Jenkins, 23 Beav. 53; Mortlock v. Buller, 10 Ves. 315; Wheate v. Hall, 17 Ves. 86; Lantsbery v. Collier, 2 K. & J. 709.

[(*f*) *Re Cotton's Trustees and the School Board for London*, 19 Ch. D. 624.]

[(*g*) *Per Jessel, M.R., Peters v. Lewes and East Grinstead Railway Company*, 18 Ch. D. 429; but see *S. C.* 16 Ch. D. 703.]

¹ Moore v. Shultz, 13 Pa. St. 101; Hetzel v. Hetzel, 69 N. Y. 1; Salisbury v. Bigelow, 20 Pick. 174. If the continuance of a trust is unlimited by the settlement, the powers will subsist till its end, even though the trustees delay carrying out the directions of the settlor, Cresson v. Ferree, 70 Pa. St. 446.

tion and approval of a co-trustee, will be deemed the act of both (*h*).

[12. Where a power of leasing was given to a legal tenant for life, and after his death to trustees, during the minority of a legal tenant in tail, and the tenant for life entered into a contract to grant a building lease but died before the lease was granted, it was held that the trustees had power to effectuate the contract of the tenant for life by executing a lease (*i*).] [Contract for lease by tenant for life carried out.]

13. Trustees in the exercise of their powers must act *bonâ fide* and impartially for the benefit of their *cestuis que trust*—i.e. the persons claiming under the settlement, and must not deviate from the terms of the trust from moral considerations, or seek to do what they may think right, if in excess of their trust (*k*). Moral considerations.

III. Of the effect of *disclaimer*, *assignment* and *survivorship* of the estate.

First. Of disclaimer.

1. If a power be given to several trustees, and one of them *disclaims* [the trust], the power may be exercised by the continuing trustees or trustee (*l*). Effect of disclaimer upon powers.

In *Hawkins v. Kemp* (*m*), a purchaser at first objected that the accepting trustees could not exercise the power, or not without the appointment of a new trustee in the place of the trustee who had disclaimed, but the point was afterwards abandoned by the purchaser's counsel as untenable. And the late Vice-Chancellor of England, in a subsequent case, observed: "I have always understood, ever since the point was decided in *Hawkins v. Kemp*, or rather was, as the judges said in that case, properly abandoned by the defendant's counsel as not capable of being contended for, that where two or more persons are appointed trustees, and all of * them, except one, re- [* 607] nounce, the trust may be executed by that one" (*n*).

Adams v. Taunton (*o*) is a direct decision by Sir J. Adams v. Leach to the same effect. A testator had devised his Taunton. estates to A. and B. upon trust to sell and apply the proceeds amongst his children, and declared that the receipts of the said A. and B. should be sufficient dis-

(*h*) *Messeena v. Carr*, 9 L. R. Eq. 260.

(*i*) *Davis v. Harford*, 22 Ch. D. 128.]

(*k*) *Ellis v. Barker*, 7 L. R. Ch. App. 104.

(*l*) *Jenk.* 44; *Crewe v. Dicken*, 4 Ves. 97; *Earl Granville v. McNeile*, 7 Hare, 156; *White v. M'Dermott*, 7 I. R. C. L. 1.

(*m*) 3 East, 410.

(*n*) *Cooke v. Crawford*, 13 Sim. 96.

(*o*) 5 Mad. 435; and see *Bayly v. Cumming*, 10 Ir. Eq. Rep. 410; *Cooke v. Crawford*, 13 Sim. 96; *Sands v. Nugee*, 8 Sim. 130.

charges. A. renounced, and Sir J. Leach, after having taken time to consult the authorities, said, "It being now settled that a devise to A., B., and C. upon trust is a good devise to such of the three as accept the trust, it follows by necessary construction that by the receipt of the trustees is to be intended the receipt of those who accept the trust (*p*).

Powers to "trustees" or "executors." 2. If the power be not given to the trustees by name, but to the "trustees" or "executors"; it is clear, *à fortiori*, that if one disclaim the acting trustees or executors may exercise the power" (*q*)¹.

[3. By the Conveyancing Act, 1882, sect. 6, which applies to powers created by instruments coming into operation either before or after the commencement of the Act, "a person to whom any power, whether coupled with an interest or not, is given, may by deed disclaim the power; and after disclaimer shall not be capable of exercising or joining in the exercise of the power. On such disclaimer the power may be exercised by the other or others, or the survivors or survivor of the others, of the persons to whom the power is given, unless the contrary is expressed in the instrument creating the power" (*r*). But this section does not authorize a trustee to disclaim a particular power so as to vest the exercise of it in his co-trustees while he continues a trustee for other purposes (*s*).

[Renunciation.]

4. It has been held in Ireland that the renunciation by one executor, by an instrument under seal, of the office of executor operates as a disclaimer under this section of powers annexed to the executorship (*t*).]

(*p*) From his Honour's words, "the receipts of the trustees," it might be thought the power had been given, not to A. and B. by name, but to "the trustees": the R. L. has been consulted, and it appears, as stated in the report, that the power was given to "the said A. and B."

(*q*) *Worthington v. Evans*, 1 S. & S. 165; *Boyce v. Corbally*, L. & G. t. Plunket, 102; and see *Clarke v. Parker*, 19 Ves. 1; *White v. M'Dermott*, 7 I. R. C. L. 1.

[(*r*) 45 & 46 Vict. c. 39, s. 6.]

[(*s*) See *Re Eyre*, 49 L. T. N. S. 259.]

[(*t*) *Re Fisher and Haslett*, 13 L. R. Ir. 546.]

¹ In the matter of Bull, 45 Barb. 334. This matter is the subject of legislative regulation in several of the United States. Generally speaking, however, if a power to sell lands is given to trustees or executors, it may be exercised so long as one of the donees survive; if lands are granted in trust for sale, the trustees are joint tenants, and the survivor takes the freehold and can make the sale. *Peter v. Beverly*, 10 Pet. 532; *Burr v. Sim*, 1 Whart. 266; *Parker v. Sears*, 117 Mass. 513; *Wells v. Lewis*, 4 Met. (Ky.) 269; *Jackson v. Bates*, 14 Johns. 391; *Joy Kendall v. Rutherford*, 1 Green Ch. 360.

Secondly, Of assignment.

1. The *power* is not appendant to the estate, so as to follow along with it in every transfer by the trustee, or devolution by course of * law (*u*). But where [* 608] the estate is duly transferred to persons regularly appointed trustees under a power in the settlement creating the trust, the transferees take the estate and the office together, and can exercise the power. Where the settlement contains no such power, it seems that the appointment of new trustees by the Court would not, but for recent Acts, communicate arbitrary or special discretionary powers (*v*), unless they were expressly (*w*) or in fair construction limited to the trustees for the time being (*x*)¹. If powers be given to trustees, their heirs, executors, administrators, and assigns, and the Court appoints new trustees, and makes a vesting order, the new trustees are duly constituted assigns, and may therefore be justly considered within the purview of the settlement.² But assigns from a trustee *mero motu*, and without competent authority, would not be so considered.

[2. By a recent enactment every trustee appointed by any Court of competent jurisdiction has as well before as after the trust property becomes by law, or by assurance, or otherwise, vested in him, the same powers, authorities, and discretions, and may in all respects act as if he had been originally nominated a trustee by the instrument creating the trust; and this enactment

Effect of
assignment
of the estate.

[44 & 45
Vict. c. 41, s.
33.]

(*u*) *Cole v. Wade*, 16 Ves. 47, *per* Sir W. Grant; *Crewe v. Dicken*, 4 Ves. 97; *Re Burt's Estate*, 1 Drew. 319; *Wilson v. Bennett*, 5 De G. & Sm. 475. The case of *Hardwick v. Mynd*, 1 Anst. 109 is an anomaly.

(*v*) *Doyley v. Attorney-General*, 2 Eq. C. Ab. 194; *Fordyce v. Bridges*, 2 Ph. 497, see 510; *Newman v. Warner*, 1 Sim. N. S. 457; *Cooper v. Macdonald*, 35 Beav. 504; and see *Cole v. Wade*, 16 Ves. 44, 47; *Hibbard v. Lambe*, Amb. 309.

(*w*) *Bartley v. Bartley*, 3 Drew. 384; *Brassey v. Chalmers*, 4 De G. M. & G. 528.

(*x*) *Byam v. Byam*, 19 Beav. 66.

¹ The question is one of intention. *Is the power a personal confidence or not?* *Ross v. Barclay*, 18 Pa. St. 179; *Gibbs v. Marsh*, 2 Met. 252; *Pratt v. Rice*, 7 Cush. 209. It has been held that a direction absolutely and in any event to convert realty into personalty, and as such to make distribution of the proceeds, indicates that the settlor intended the power of sale to attach to the office; and a sale in such a case may be made by the acting or surviving trustee. *Gray v. Henderson*, 71 Pa. St. 368; *Sharp v. Pratt*, 15 Wend. 610; *Going v. Emery*, 16 Pick. 111.

² *Burdick v. Goddard*, 11 R. I. 516.

applies to appointments made either before or after the commencement of the Act (y).]

Release with
intention of
disclaiming.

3. We have seen that if one trustee *disclaims* in the strict sense of the word, the power will not be extinguished, but will survive to the co-trustee; but, according to the old doctrine, if a trustee instead of *disclaiming* had *assigned* the estate, that was a virtual acceptance of the trust, and then the conveyance of the retiring trustee did not pass the power into the hands of the continuing trustee (z); but at the present day it seems a release with the intention of disclaimer would have all the operation of a formal and actual disclaimer (a).

Whether the
power will
remain in the
trustee after
alienation of
the estate.

4. Though an assignment of the *estate* will not carry the *power* to the assignee, it does not follow that the [* 609] power will remain in the* assignor, so as to be transmissible to his representative; for where it was the settlor's intention that the *estate and power should be coupled together*, the trustee, by severing the union through the alienation of the estate, may intercept the execution of the power by the representative. Thus [where, prior to the Conveyancing and Law of Property Act, 1881, an estate was] limited to A. and his heirs upon a trust to be executed by A and his *heirs*, and A. in his lifetime conveyed away the estate, or devised it by his will, it was held that the heir of A. could not execute the power (b); for the heir was no heir *quatenus* this estate, for it was not allowed to *descend*, but was aliened or devised away from the person who would have been heir; [and the same principle equally applies to a case falling under the recent Act, where if the estate be conveyed away by the trustee in his lifetime, so as not to vest in his personal representative, such representative cannot execute the power.]

Case of real
and personal
estate
coupled
together.

5. In *Cole v. Wade* (c), a testator gave the residue of his real and personal estate to Ruddle and Wade (whom he appointed his executors), their executors, administrators, and assigns, and directed *his said trustees and executors*, after making certain payments thereout, to convey and dispose of the said residue of his real and

[(y) 44 & 45 Vict. c. 41, s. 33. This section takes the place of the corresponding section in Lord Cranworth's Act, 23 & 24 Vict. c. 145, s. 27, which was repealed by 44 & 45 Vict. c. 41.]

(z) *Doyley v. Attorney-General*, 2 Eq. Ca. Ab. 194; *Crewe v. Dicken*, 4 Ves. 97.

(a) *Supra*, p. 196.

(b) *Wilson v. Bennett*, 5 De G. & Sm. 475; and see *Re Burt's Estate*, 1 Drew. 319.

(c) 16 Ves. 27.

personal estate unto and amongst such of his relations and kindred in such proportions, manner and form, as *his said executors* should think proper, his intention being that everything relating to that disposition should be entirely at the discretion of the said *trustees and executors, and the heirs, executors and administrators of the survivor of them* (d). Wade, the survivor, devised and bequeathed the real and personal estate of the testator to William and Edward Bray, their heirs, executors, administrators and assigns, upon the trusts of the will, and named them his executors for that specific purpose only, appointing his wife and another person executors as to his own estates. The question was discussed, whether William and Edward Bray could exercise the power of distribution among the relations. Sir W. Grant said, "The original trustees and executors were the same persons; all the real and personal estate was vested equally in them; but the heirs and executors of the surviving trustee might be different persons; yet all the directions about the distribution of the residue proceed upon the supposition that the same persons are to select the objects and settle the proportions in which they are to take; but if the real estate is to go to one, *and the personal estate to another, the tes- [* 610] tator has left it entirely uncertain how the power is to be executed. Whether the Messrs. Bray can in any sense be the executors of Wade, with whose own property they are not to intermeddle, it is not material to determine." His Honour, therefore, decided that the power had become extinguished.

6. But the existence of a power annexed to a trust and forming an integral part of it does not depend on the continuance of the legal estate *per se* in the donee of the power, where there is no express declaration to the contrary; as, where a testator gave a sum of money to be invested in the funds in the names of the head of a college at Oxford, the junior bailiff of the city, and the elder churchwarden of a parish, the dividends to be applied to certain purposes as the trustees should approve, and the bailiff and churchwarden being *annual* officers, the investment as directed by the will would have been accompanied with frequent transfers of the stock, the Court ordered that the money should be invested in the names of two new trustees jointly with the head of the college, but that the objects of the

The estate may be severed from the powers.

(d) The testator used this last form of expression elsewhere in the will.

charity should be nominated and approved in the manner pointed out by the will (e).

[Release of powers under recent Act.]

[7. By the Conveyancing and Law of Property Act, 1881, "a person to whom any power, whether coupled with an interest or not, is given may by deed release, or contract not to exercise the power;" and that, whether the power was created by an instrument coming into operation before or after the commencement of the Act (f). But it has been held that this does not apply to a power coupled with a duty; as to which Kay, J. observed, "a trustee who has a power coupled with a duty is bound, so long as he remains a trustee, to preserve that power, and to exercise his discretion as circumstances arise whether the power shall be used or not, and can no more by his own voluntary act destroy a power of that sort than he can voluntarily put an end to any other trust that may be committed to him (g).]

[Does not apply to power coupled with a duty.]

Thirdly. As to survivorship.

Survivorship of powers.

1. The survivorship of the *estate* carries with it the survivorship of such *powers* as are annexed to the trust. If a *mere* power be given to A., B., and C., and one of them die, it is perfectly clear that the power cannot be exercised by the survivors; but if trustees have an *equitable* power annexed to the trust, and forming an integral part of it, as if an estate be [* 611] vested in three trustees upon trust *to sell, then, as the power is coupled with an interest, and the interest survives, the power also survives (h).

Trust powers.

The principle that *trust powers* survive with the *estate* appears to be as old as the time of Lord Coke, for he observes, "If a man *deviseth land to his executors to be sold*, and maketh two executors, and the one dieth, yet the survivor may sell the land, because as the *estate*, so the *trust* shall survive; and so note the diversity between a *bare trust* and a *trust coupled with an interest*" (i). At the present day a *trust*, that is, a *power imperative*, whether a bare power, or a power coupled

(e) *Ex parte* Blackburne, 1 J. & W. 297; and see Hibbard v. Lamb, Amb. 309.

[(f) 44 & 45 Vict. c. 41, s. 52.]

[(g) *Re Eyre*, 49 L. T. N. S. 259.]

(h) *Lane v. Debenham*, 11 Hare, 188; and see *Gouldsb.* 2, pl. 4; *Peyton v. Bury*, 2 P. W. 628; *Mansell v. Vaughan*, Wilm. 49; *Eyre v. Countess of Shaftesbury*, 2 P. W. 108, 121, 124; *Butler v. Bray*, Dyer, 189, b; *Byam v. Byam*, 19 Beav. 58; *Jenk.* 44; *Co. Lit.* 112, b. 113, a; *Flanders v. Clark*, 1 Ves. 9; *Potter v. Chapman*, Amb. 100; *Jones v. Price*, 11 Sim. 557.

(i) *Co. Lit.* 113, a; and see *Ib.* 181, b.

with an interest, would be equally carried into execution in the *forum* of a Court of equity; for the maxim now is, The trust or power imperative is the estate. But in the time of Lord Coke, had a bare power been devised to A. and B. to sell an estate, as for payment of debts, the authority was one which A. and B. during their joint lives were compellable by *subpœna* in Chancery to execute for the benefit of the creditors; but if A. happened to die before the sale was carried into effect, the trust was extinguished, and the heir who had always retained a right to the intermediate rents and profits was then seised of the absolute and indefeasible inheritance. But in case the testator had devised the estate to A. and B. to sell for payment of debts, then, as the trust was not a mere power, but a power coupled with an interest, it received a more liberal construction, and as upon the death of A. the whole estate passed by survivorship to B., the power being annexed to the estate, was held to survive with it.¹

¹ In examining the cases of powers before the Statute of Uses, the following points may be usefully noticed. 1. A person seised of the legal estate of lands could not, before the Statute of Wills, have devised them directly, and therefore he could not have gained his object indirectly by means of a power: had a testator devised that A. and B. should sell his estate, the authority was void. 2. But a use was devisable, and therefore, if *cestui que use* had devised the lands to a stranger, though the legal estate did not pass (the Statute of Richard the Third, which made mention of feoffments and grants, not extending to wills), the devisee might still have sued his *subpœna* in Chancery, and have compelled the feoffees to execute a conveyance of the estate. 3. If *cestui que use* had devised that A. and B. should sell, and A. and B. in pursuance of the authority had made a feoffment or grant, this assurance seems to have operated retrospectively as the assurance of the testator, and so, falling within the words of the Statute of Richard, served to pass even the legal estate. 4. And *cestui que use* might have devised such an authority even to his feoffees, and the power would have been construed in the same manner as if it had been devised to a stranger. Thus where a man enfeoffed A. and B. to his own use, and afterwards devised that the said A. and B. should sell the estate and apply the proceeds, &c., and A. and B., on the decease of the testator, enfeoffed C. and D. to the like uses, it was ruled that A. and B. might still sell under the power, although they had parted with the legal fee. 5. Until the sale was effected, the feoffees were trustees for the testator's heir, and were bound to account to him for the accruing rents and profits; and if the power which, whether given to a stranger or to the feoffees, was construed as a naked authority, became extinguished by any means, as by the death of the donees of the power, the heir was as absolutely entitled to the use in fee, as if no will had been made. 6. So long as the power subsisted, the person who would suffer by the extinguishment of the power might have compelled the donees, by the filing a bill in Chancery, to execute the power. 7. But if the

Before Statute of Uses a power given by will over the legal estate was void. But over the use was good.

The execution of the power over the use passed the legal estate.

The power might be vested in the feoffees.

Until the power was executed the feoffees were trustees for the heir.

The object of the power could have compelled the execution.

Survivorship where the power is given to trustees by name. [*612] * 2. A distinction may perhaps be thought to exist between cases where the language of the trust is indefinite as to the persons by whom it is to be exercised (for example, where an estate is vested in trustees and their heirs *in trust to sell*, &c.), and those cases where the estate is limited to *persons by name*, as upon trust that "the said A. and B.," or that "the *said* trustees" (which is equivalent to naming them), shall sell; but the Courts have never relied upon any distinction of the kind, and it seems to be now decided that even where the trust is reposed in the trustees by name, the survivor, who takes the estate with a duty annexed to it, can execute the trust (*k*); and the *rule* of survivorship applies not only to trusts, or powers imperative which are construed as trusts, but also to such discretionary powers as are annexed to the office of trustee, and are meant to form an integral part of it (*l*).

Powers not annexed to the trust.

3. But powers which are purely *arbitrary*, and independent of the trust, and not intended in furtherance of the trust, must, it is conceived, be construed strictly, and be governed by the rules applicable to ordinary powers. If, for instance, the trustees by name have a power of revoking the limitations, and shifting the property into a different channel, this discretion is evidently meant to be personal, and not to be annexed to the estate or office (*m*).¹

[Recent Act.] [4. Now, as to executorships and trusts constituted after or created by instruments coming into operation after the 31st December, 1881, a power or trust given to or vested in two or more executors or trustees jointly, may, in the absence of a contrary intention expressed in the instrument creating the power or trust, be exercised or performed by the survivor or survivors of them [*613] for the time * being (*n*). But it is conceived that this section does not apply to a purely arbitrary and personal power given to trustees *nominatim*.]

(*k*) *Lane v. Debenham*, 11 Hare, 188; *Hall v. May*, 3 K. & J. 585; [*Re Cooke's Contract*, 4 Ch. D. 454.]

(*l*) *Warburton v. Sandys*, 14 Sim. 622.

(*m*) See *Lane v. Debenham*, 11 Hare, 192.

[(*n*) 44 & 45 Vict. c. 41, s. 38.]

If no specific object of the power, the execution was optional. proceeds of the sale were to be distributed *in pios usus*, as no one could plead a personal loss by the non-execution of the power, there was no one to sue a *subpoena*, and the donees of the power were left to the arbitrary exercise of their own discretion. See case *temp.* H. 7. Treat. of Powers, Appendix No. 1, 6th edit.

¹ *Hazel v. Hagan*, 47 Mo. 277.

IV. Of the control of the Court over the exercise of powers.

1. Where a power is given to trustees to do, or not do a particular thing at their discretion, the Court, has no jurisdiction to lay a command or prohibition upon the trustees as to the exercise of that power, provided their conduct be *bonâ fide*, and their determination is not influenced by improper motives (o)¹.

Control of the Court over arbitrary powers.

Thus in *Pink v. De Thuissey* (p), a testatrix gave 1000*l.* to A. upon a condition precedent, but left "her executor at liberty to give the said sum if he found the thing proper" though the condition should not have been performed. A. died without having fulfilled the condition or received the money, and his personal representative filed a bill against the executor of the testatrix to compel payment of the legacy. A. in his lifetime had applied for the money, but the executor had not thought right to comply with the request. Sir T. Plumer, in dismissing the bill, observed, "The executor says *he did not think proper to advance the legacy*: is the Court to decide upon the propriety of the executor's withholding the legacy? That would be assuming an authority confided by the will to the discretion of the executor: it would be to *make a will for the testatrix, instead of expounding it.*"

Pink v. De Thuissey.

2. But where the power is *accompanied with a duty* and meant to be exercised (as a power of leasing), the Court will compel the execution or execute it in the place of the trustees (q). So where the trustees had a power of sale, "if they should consider it advisable, but not otherwise," it was held that the power, though

Power with a duty.

(o) *Thomas v. Dering*, 1 Keen, 729; *Re Eddowes*, 1 Dr. & Sm. 395; *Talbot v. Marshfield*, 2 Dr. & Sm. 285; *French v. Davidson*, 3 Mad. 396; *Silliboufne v. Newport*, 1 K. & J. 602; *Walker v. Walker*, 5 Mad. 424; *Banks v. Le Despencer*, 11 Sim. 527, *per* Sir L. Shadwell; *Attorney-General v. Governors of Harrow School*, 2 Ves. 551; *Cowley v. Hartstonge*, 1 Dow. 378, *per* Lord Eldon; *Potter v. Chapman*, Amb. 99, *per* Lord Hardwicke; *Carr v. Bedford*, 2 Ch. Rep. 146; *Wain v. Earl of Egmont*, 3 M. & K. 445; *Livesey v. Harding*, Tambl. 460; *Collins v. Vining*, C. P. Coop. Rep. 1837-38, 472; *Kekewich v. Marker*, 3 Mac. & G. 326, *per* Lord Truro; *Re Coe's Trust*, 4 K. & J. 199; *Brophy v. Bellamy*, 8 L. R. Ch. App. 798; [*Gisborne v. Gisborne*, 2 App. Cas. 300; *Tabor v. Brooks*, 10 Ch. D. 273; *Marquis Camden v. Murray*, 16 Ch. D. 161; *Tempest v. Lord Camoys*, 21 Ch. D. 571; *Thomas v. Williams*, 24 Ch. D. 558.].

(p) 2 Mad. 157.

(q) *Tempest v. Lord Camoys*, 21 Ch. D. 576, note.

¹ *Eldredge v. Head*, 106 Mass. 582; *Green v. McBeth*, 12 Rich. Eq. 254.

discretionary in form, was given to the trustees for the purposes of the will, and if those purposes could not be effected without the exercise of the power, they were bound to exercise it (*r*).

Where trustees are required to do an act.

[*614] *3. The Court will not in general control the discretion of trustees in reference to the adoption of any particular species of investment (*s*). But where trustees were "authorized and *required*," with the consent and *direction* of the tenant for life, to invest in leaseholds, the clause was held to be imperative upon the tenant for life's demand, and the trustees were not even allowed to say that the leaseholds would impose personal liabilities upon themselves, for by being parties to the settlement they had engaged to do it (*t*). But where the trustees were *required* to lend money to the husband on his bond, and he took the benefit of the Insolvent Debtors Act, it was held that, under such altered circumstances, the trustees were justified in refusing a loan to the husband (*u*); and where a variation of securities was to be with the consent of the tenant for life, and the fund was in danger, the Court called in the fund, though the consent of the tenant for life was refused (*v*).

[Maintenance of lunatic.]

[4. Where property was held upon trust to pay the income in such way, at such time, and in such manner, as the trustee should think fit towards the maintenance of a lunatic during her life, with power to invest any surplus not required for the purpose as capital, it was held that the trustees had no such discretion as would oust the jurisdiction of the Court, to apply the income in the lunatic's maintenance in exoneration of her absolute property (*w*).]

Maintenance of infants.

5. If a fund be applicable to the *maintenance of children* at the discretion of trustees, the Court will not take upon itself to regulate the maintenance, but will leave it to the trustees (*x*). [But the discretion must be exercised within the limits of a sound and honest execution of the trust (*y*); and where the Court

(*r*) Nickisson v. Cockill, 3 De G. J. & S. 622; 2 New Rep. 557.

(*s*) Lee v. Young, 2 Y. & C. C. C. 532.

(*t*) Beauclerk v. Ashburnham, 8 Beav. 322; Cadogan v. Earl of Essex, 2 Drew. 227.

(*u*) Boss v. Godsall, 1 Y. & C. C. C. 617.

(*v*) Costello v. O'Rourke, 3 I. R. Eq. 172.

[(*w*) *Re* Weaver, 21 Ch. D. 615.]

(*x*) Livesey v. Harding. Tambl. 460; Collins v. Vining, C. P. Coop. Rep. 1837-38, 472; Brophy v. Bellamy, 8 L. R. Ch. App. 798.

[(*y*) Costabadie v. Costabadie, 6 Hare, 410; Davey v. Ward, 7 Ch. D. 754.]

was of opinion that the exercise of the discretion had not been proper, it set it aside and regulated the maintenance irrespective of the wishes of the trustees (z). But the Court has no jurisdiction on a summons for maintenance intituled only "in the matter of the infant" to control the discretion of the trustees, which can only be done on an action or on an originating summons to which the trustees are made parties; *Re Lofthouse*, W. N. 1885, p. 118.

6. Where trustees are guardians of infants, and one guardian pays the income to the other guardian for the maintenance and education of the infants, he will not be discharged by such payment, but must show that the infants have been properly maintained and *ed. [*615] ucated, and that the amount paid to the other guardian was a proper allowance for the purpose (a).

7. Where a fund is bequeathed to executors or trustees upon trust to distribute among the testator's relations, or apply the fund to any other specific purpose *in such manner as the executors or trustees may think fit*, the executors or trustees, if willing to execute the trust, will not, even on a suit being instituted for carrying the trusts into execution, be deprived of their discretionary power, but may propose a scheme before the judge in chambers for the approbation of the Court (b). Mode of execution of trust.

8. Where the *objects* of a charity are from time to time to be at the discretion of the trustees (as if annual sums be made distributable *either* to private individuals or public institutions, *as the trustees may think fit*), the Court will not even order a scheme to be proposed, but will leave the trustees to the free exercise of their power with liberty for all parties to apply (c). Power as to the objects of the trust.

9. So where trustees had a power of selecting a lad for education from certain parishes, and if there were no suitable candidate, then from any other parish, and the trustees upon consideration rejected the candidate from the specified parishes, and selected a lad from another parish, it was held that the Court could not Selection of particular objects.

[(z) *Davey v. Ward*, 7 Ch. D. 754; *Re Roper's Trusts*, 11 Ch. D. 272.]

[(a) *Re Evans*, 26 Ch. D. 58.]

(b) *Brunsdon v. Woolledge*, Amb. 507; *Bennett v. Honywood*, Id. 708; *Mahon v. Savage*, 1 Sch. & Lef. 111, *Supple v. Lowson*, Amb. 729, &c.

(c) *Waldo v. Caley*, 16 Ves. 206; *Horde v. Earl of Suffolk*, 2 M. & K. 59; and see *Powerscourt v. Powerscourt*, 1 Moll. 616; *Holmes v. Penney*, 3 K. & J. 103.

control the discretion. The trustees had assigned no reason for their choice, but that the Court said was not necessary, and in many cases would not be proper (*d*).

Reasons for exercise of the power.

10. But though trustees invested with a discretionary power are not bound to assign their reasons for the way in which they exercise it; yet, if they do state their reasons, and it thereby appears that the trustees were labouring under an error, the Court will set aside the conclusion to which they came upon such false premises (*e*).

Powers not to be exercised *nunc pro tunc*.

11. Where trustees have a discretionary power they must exercise their judgment according to the *circumstances as they exist at the time*, and they cannot, therefore, anticipate the arrival of the proper period by affecting to release it or by pledging themselves beforehand as to the mode in which the power shall be executed *in futuro* (*f*).¹

[Exercise of the power by will.]

[* 616] * [12. Where a trustee had an absolute discretion to apply the trust funds for certain charitable purposes as he might think fit, and he died without exercising the power by act *inter vivos*, but by his will gave definite directions as to the application of the funds, it was held that the power was duly exercised (*g*).]

Fraud.

13. There is sufficient ground for the interference of the Court, wherever the exercise of the discretion by the trustees is infected with fraud (*h*), or misbehaviour (*i*), or they decline to undertake the duty of exercising the discretion (*k*), or generally where the dis-

(*d*) *Re Beloved Wilkes's Charity*, 3 Mac. & G. 440.

(*e*) *Ib.* 3 Mac. & G. 448; *King v. Archbishop of Canterbury*, 15 East. 117.

(*f*) *Weller v. Ker*, 1 L. R. Sc. App. 11; [*Moore v. Clench*, 1 Ch. D. 447, 453; *Chambers v. Smith*, 3 App. Cas. 795, 815; *Oceanic Steam Navigation Company v. Sutherland*, 16 Ch. D. 236;] and see *Thacker v. Key*, 8 L. R. Eq. 408.]

[(*g*) *Copinger v. Crehane*, 11 I. R. Eq. 429.]

(*h*) *Attorney-General v. Governors of Harrow School*, 2 Ves. 552, *per* Lord Hardwicke; *Potter v. Chapman*, Amb. 99, *per eundem*; *Richardson v. Chapman*, 7 B. P. C. 318; *French v. Davidson*, 3 Mad. 402, *per* Sir J. Leach; *Talbot v. Marshfield*, 4 L. R. Eq. 661; and on appeal, 3 L. R. Ch. App. 622; *Thacker v. Key*, 8 L. R. Eq. 408.

(*i*) *Maddison v. Andrew*, 1 Ves. 59, *per* Lord Hardwicke; *Attorney-General v. Glegg*, Amb. 585, *per eundem*; *Willis v. Childe*, 13 Beav. 117; and see *Re Beloved Wilkes's Charity*, 3 Mac. & G. 440; and see *Byam v. Byam*, 19 Beav. 65.

(*k*) *Gude v. Worthington*, 3 De G. & Sm. 389. This was apparently the ground on which the case was decided, but the refu-

¹ See *Library Company of Philadelphia v. Williams*, 73 Pa. St. 249.

cretion is *mischievously and ruinously* exercised, as if a trustee be authorized to lay out money upon Government, or real or personal security, and the trust fund is outstanding upon any *hazardous* security (*l*).¹ [But where the course pursued by the trustees is within the letter of the power, the *onus* is on the persons challenging their conduct to show that their discretion has been mischievously, or ruinously, or fraudulently exercised (*m*).]

14. And where the trustees of a *charity* were empowered to lease for three lives or thirty-one years, the Court expressed an opinion that the discretion might be controlled, if it appeared for the benefit of the charity that such a power should not be acted upon (*n*). Powers in case of charity.

15. Where proceedings had been taken for controlling the discretion of the trustees, Lord Hardwicke said, "though he could not contradict the intent of the donor, which was to leave it in the discretion of the trustees, yet he would not dismiss the information but would still *keep a hand over them*" (*o*). The Court will exercise a surveillance where the trustees are before it.

* 16. Where a suit has been instituted for [* 617] the administration of the trust, and a decree has been made, that attracts the Court's jurisdiction, and the trustee cannot afterwards exercise the power without the concurrent sanction of the Court: as if a trustee have a power of investment he cannot make any investment without the approval of the Court (*p*); or if a trustee have a power of appointment of new trustees, he is not excluded from the right of nominating the person, but the Court must give its sanction to the choice (*q*), [and if the Court does not approve the After decree trustee cannot exercise even a special power without the sanction of the Court.

sal of the trustees to act does not sufficiently appear on the report. And see *Mortimer v. Watts*, 14 Beav. 622; *Re Sanderson's Trust*, 3 K. & J. 497; *Prendergast v. Prendergast*, 3 H. L. Cas. 195; *Palmer v. Newell*, 25 L. T. N. S. 892; *Bennett v. Wyndham*, 23 Beav. 528; *Gray v. Gray*, 11 Ir. Ch. Rep. 218, 13 Ir. Ch. Rep. 404.

(*l*) *De Manneville v. Crompton*, 1 V. & B. 359; *Costello v. O'Rorke*, 3 I. R. Eq. 172; and see *Lee v. Young*, 2 Y. & C. C. C. 532. [*m*] *Re Brittlebank*, 30 W. R. 99.]

(*n*) *Ex parte Berkhamstead Free School*, 2 V. & B. 138.

(*o*) *Attorney-General v. Governors of Harrow School*, 2 Ves. 551.

(*p*) *Bethell v. Abraham*, 17 L. R. Eq. 24.

(*q*) *Webb v. Earl of Shaftesbury*, 7 Ves. 480; — *v. Roberts*, 1 J. & W. 251; *Middleton v. Reay*, 7 Hare, 106; *Kennedy v. Turnley*, 6 Ir. Eq. Rep. 399; *Consterdine v. Consterdine*, 31 Beav. 333; *Gray v. Gray*, 13 Ir. Ch. Rep. 404; [*Minors v. Battison*, 1 App. Cas. 428; *Tempest v. Lord Camoys*, 21 Ch. D. 571; *Re Norris*, 27 Ch. D. 333; *Cecil v. Langdon*, 28 Ch. D. 1; *Re Hall*, 51 L. T. N. S. 901.]

¹ *Carson v. Carson*, 1 Wins. (N. C.) 24.

nominee of the trustee, it will call upon the trustee to make a new nomination, and will not appoint a person not nominated by the trustee merely on the ground that the nominee was not approved. Nor will the Court appoint a person not nominated by the trustee on the mere ground of such person being more eligible than the nominee of the trustee (*r*).

[Effect of
Order 55.]

Where an action was commenced by suit for the general execution of the trusts of a will, and an order was made under Ord. 55, R. 3, directing certain inquiries, including an inquiry whether new trustees had been appointed, and whether any and what steps ought to be taken for the appointment of new trustees, and pending the inquiry the surviving trustee appointed a new trustee under the powers of the Conveyancing and Law of Property Act, 1881, it was held, that by the order the powers of the trustee were not interfered with, except so far as the exercise of them must necessarily clash with the particular inquiries directed; that it was the duty of the trustee not to fill up the vacancies in the trusteeship without the approval of the Court; and that the proper course would have been for the trustee to apply in chambers, stating that he intended to appoint the new trustee, and if it was found that there was no objection to the appointment it would have been approved (*s*).

▲Acts before
decree.

17. But if *no decree has been made*, then, as the plaintiff may abandon his suit at any moment, the trustee must not assume that a decree will be made, but must proceed in all necessary matters with the due execution of the trust (*t*). It would not be prudent, however, except in formal matters, to act without first consulting * 618] the Court. It was held in one case, that the trustees had not exceeded their duty by appointing new trustees after the filing of a bill, as no extra costs had been thereby occasioned (*u*); but in another case it was said that the trustees ought, under the difficulties in which they were placed, to have consulted the Court, and as, instead of so doing, they had acted independently and made an appointment, which, though they entered into evidence they could not justify, and great extra costs had arisen out of their con-

[(*r*) *Re Gadd*, 23 Ch. D. 134, and see *Middleton v. Reay*, *ubi supra*.]

[(*s*) *Re Hall*, 51 L. T. N. S. 901.] *Re Hall* is also reported in 54 L. J. N. S. Ch. 527.

(*t*) See *Williams on Executors*, 891, 4th edit.

(*u*) *Cafe v. Bent*, 3 Hare, 245; [*Thomas v. Williams*, 24 Ch. D. 558, 567.]

duct, the extra costs which had been occasioned were thrown upon the trustees personally (*v*).

18. In dealing with the subject of the powers of Lord St. Leonards' Act. trustees we should call attention to the important enactment, 22 & 23 Vict. c. 35, s. 30, by which trustees [were authorized to] apply by *petition* to any judge of the Court of Chancery (*w*), or by a *summons* upon a *written statement* to any such judge at chambers for the opinion or direction of such judge respecting the management or administration of the trust property.

19. By the Amendment Act, 23 & 24 Vict. c. 38, s. 9, the petition or statement is required to be *signed by* ^{Act.} *counsel*, and the judge may require the attendance of counsel either in chambers or in court (*x*).

20. In proceedings under this enactment there is no investigation of the facts, but the correctness of the ^{Affidavits} petition or statement is assumed, and if there be any ^{not allowed.} *suggestio falsi* or *suppressio veri* the order of the Court *pro tanto* is no indemnity to the trustee. No affidavits, therefore, ought to be filed, and the costs of them would be disallowed (*y*).

21. The Court has jurisdiction in England, though ^{Jurisdiction.} one of the trustees be resident in Ireland (*z*).

22. What parties are to be *served* is in the discretion of the * judge, and V. C. Wood was of opinion [* 619] ^{Parties to be} that the proper course was not to serve the petition on ^{served.} any one in the first instance, but to apply at chambers for a direction as to the persons to be served (*a*), and V. C. Malins thought the question of service ought to be dealt with at the hearing of the petition (*b*). But V. C. Kindersley said he would never allow a petition under the Act to be brought on for the purpose of ascer-

(*v*) Attorney-General *v.* Clack, 1 Beav. 467; and see Turner *v.* Turner, 30 Beav. 414; Talbot *v.* Marshfield, 4 L. R. Eq. 661, 3 L. R. Ch. App. 622; Bethell *v.* Abraham, 17 L. R. Eq. 24.

[(*w*) These applications should now be made to the Chancery Division of the High Court of Justice; see 36 & 37 Vict. c. 66, s. 34.]

(*x*) See observations of V.C. Stuart in *Re Dennis*, 5 Jur. N.S. 1388, which may have led to this additional enactment. For the practice under the Act, see [Rules of the Supreme Court 1883, Order 52, R. 19-22, Order 65, R. 26. Notwithstanding the Judicature Act, 1873, and Order 19, R. 4, of the Rules of the Supreme Court, 1883, signature of counsel is still necessary, *Re Boulton's Trusts*, 51 L. J. N. S. Ch. 493.]

(*y*) *Re Muggeridge's Trust*, Johns. 625; *Re Mockett's Will*, Ib. 628; *Re Barrington's Settlement*, 1 J. & H. 142.

(*z*) *Re French's Trusts*, 15 L. R. Eq. 68.

(*a*) *Re Muggeridge's Trust*, Johns. 625.

(*b*) *Re Cook's Trust*, W. N. 1873, p. 49.

taining who were to be served ; and that the petitioners must serve such persons as they thought proper, and state in the note at the end whom they had served, and that the V. C. and the other judges had agreed upon that course (c). On a petition by the trustees where the beneficiaries were infants absolutely entitled, it was held that the *infants* need not be served (d). And on a petition by trustees for the opinion of the Court as to the propriety of certain proposed *investments*, it was held that no one need be served (e). And so the Court dispensed with service on any party, where the question submitted to the Court by trustees was, whether they could make an *advancement* to a child out of a share to which the child was presumptively entitled (f).

No appeal,
&c.

23. As the Act does not give any *right of appeal*, it was not intended to authorize adjudications upon nice questions of law (g). The object of the Act was to procure for trustees at a small expense the assistance of the Court upon points of minor importance arising in the management of the trust. Thus the Court, upon the petition of the trustees of a fund for the separate use of a *married woman*, a *lunatic* not so found by inquisition, has sanctioned the payment of the annual produce to the husband, he undertaking to apply the same for the benefit of his wife and family (h). So the Court will advise trustees as to *investment* of trust funds, *payment of debts or legacies*, &c. (i); and whether trustees of a remainder can with propriety *concur* with the owner of the particular estate *in the sale* of the fee simple (k); and whether trustees can properly grant a lease upon certain terms (l); exercise a *power of sale* (m); or a [* 620] power of maintenance or *advancement* * under the circumstances stated (n); and whether *calls on shares* in companies should be borne by the testator's general estate or the legatees (o), &c. But the Court

(c) *Re Green's Trust*, 6 Jur. N. S. 530.

(d) *Re Tuck's Trusts*, W. N. 1865, p. 15.

(e) *Re Frenche's Trusts*, 15 L. R. Eq. 68.

(f) *Re Larken's Trust*, W. N. 1872, p. 85.

(g) *Re Mockett's Will*, Johns. 628.

(h) *Re Spiller*, 6 Jur. N. S. 386; [*Re T——*, 15 Ch. D. 76.]

(i) *Re Lorenz's Settlement*, 1 Dr. & Sm. 401; *Re Knowles' Settlement Trust*, W. N. 1868, p. 233; *Re Murray's Trusts*, W. N. 1868, p. 195; *Re Tuck's Trusts*, W. N. 1869, p. 15.

(k) *Earle Poulett v. Hood*, 5 L. R. Eq. 116.

(l) *Re Lees' Trusts*, W. N. 1875, p. 61.

(m) *Re Stone's Settlement*, W. N. 1874, p. 4.

(n) *Re Kershaw's Trusts*, 6 L. R. Eq. 322; *Re Breeds' Will*, 1 Ch. D. 226.

(o) *Re Box*, 1 H. & M. 522.

will not give an opinion under the Act upon matters of detail which cannot be properly dealt with without the superintendence of the Court and the assistance of affidavits, such as the laying out a particular sum on *improvements* (*p*); nor will the Court adjudicate upon *doubtful points*, the decision of which would materially affect the rights of the parties interested (*q*).

[24. We should also call attention to the Rules of the Supreme Court, 1883, Order 55, Rule 3, under which an originating summons may be taken out in the Chambers of the Judge of the Chancery Division for directing executors, administrators, or trustees, to do or abstain from doing any particular act in their character as such executors, or administrators, or trustees; but this Rule applies only to matters within the trust, and the Court refused to make an order under it, directing trustees to concur in a sale of property in a partition (*r*). Under this Order directions have been given for an advance by the trustees to the tenant for life for the purpose of stocking and taking a farm subject to the trust, for which a tenant could not be found (*s*). By Rule 12, the issue of the summons is not to interfere with or control any power or discretion vested in any executor, administrator, or trustee, except so far as such interference or control may necessarily be involved in the particular relief sought; and an order made upon such a summons will not interfere with the powers or discretions, except so far as they necessarily clash with the directions of the order (*t*).]

25. If any question arises, or doubt is entertained, respecting any matter within sect. 56 of the Settled Land Act, 1882, being the section which saves powers of the tenant for life, or trustees under a settlement, which are concurrent with those under the Act, and restricts the exercise by trustees of such powers to the extent to be presently pointed out, the Court may on the application of the trustees of the settlement, or of the tenant for life, or of any other person interested, give its decision, opinion, advice, or direction thereon (*u*).

(*p*) *Re Barrington's Settlement*, 1 J. & H. 142.

(*q*) *Re Lorenz's Settlement*, 1 Dr. & Sm. 401; *Re Hooper's Will*, 29 Beav. 656; *Re Evans*, 30 Beav. 232; *Re Bunnett*, 10 Jur. N. S. 1098.

[(*r*) *Suffolk v. Lawrence*, 32 W. R. 899.]

[(*s*) *Re Household*, 27 Ch. D. 554.]

[(*t*) *Re Hall*, 51 L. T. N. S. 901; *Re Hall* is also reported in 54 L. J. N. S. Ch. 527.]

[(*u*) 45 & 46 Vict. c. 38, s. 56, (3).]

The application should be by summons to be served [* 621] upon the *tenant for life, if not the applicant. But except the judge otherwise direct, no person except the tenant for life need be served in any case (v).

V. Of the restrictions on the powers of trustees imposed by the Settled Land Acts.

[Powers
under Settled
Land Act
cumulative.]

1. The Settled Land Act, 1882, vests in the tenant for life, including any other limited owner to whom under sect. 58 the powers of a tenant for life are given, large powers of dealing with the settled land (w), which powers cannot be released, or defeated, or avoided, either by the tenant for life or the settlor; but by sect. 56, nothing in the Act is to take away, abridge, or prejudicially affect, any power for the time being subsisting under a settlement, or by statute, or otherwise, exercisable by a tenant for life, or by trustees with his consent, or on his request, or by his direction or otherwise; and the powers given by the Act are cumulative. The effect of this enactment is not to take away from the trustees named in any settlement the powers given to them by that settlement, but to leave those powers exercisable concurrently with the powers created by the Act (x). To obviate, however, the difficulty which might arise from the existence of concurrent powers, and in order to give full effect to the powers given by the Act to the tenant for life, the section provides that, (2) in case of conflict between the provisions of a settlement and the provisions of the Act, relative to any matter in respect whereof the tenant for life exercises or contracts or intends to exercise any power under the Act, the provisions of the Act are to prevail; and accordingly, notwithstanding anything in the settlement, the consent of the tenant for life is, by virtue of the Act, to be necessary to the exercise by the trustees of the settlement, or other person, of any power conferred by the settlement exercisable for any purpose provided for in the Act.

[Consent of
tenant for
life to
exercise of
powers.]

The wording of this clause has given rise to some difficulty, but it has been interpreted by Pearson, J. by treating the first part of the clause as relating to concurrent powers in the tenant for life; in which case, if the powers under the settlement are less beneficial to

[(v) Settled Land Act Rules 1882, R. R. 4, 5.]

[(w) As to what is included in the term Settled Land, see sect. 2 of the Act.]

[(x) *Re Duke of Newcastle's Estates*, 24 Ch. D. 129.]

him than under the Act, he is entitled to exercise the powers under the Act notwithstanding any restriction in the settlement. The latter part of the clause, however, relates to the case of * concurrent powers [* 622] in the trustees of the settlement, or some other person under the settlement, and in the tenant for life, and requires the consent of the tenant for life to the exercise of the powers in addition to the requirements of the settlement (y). Where the tenant for life is capable of exercising his powers, the Court will not, even though he be a bankrupt, make an order under the *Settled Estates Act*, giving general powers of sale or of leasing to any other person, but if the tenant for life wrongfully refuse to exercise his powers, so as to prevent obvious and practicable improvements from being effected, and the persons interested come before the Court with a well considered scheme, and show that it is for the benefit of the estate that some particular lease should be granted, and that the tenant for life without sufficient reason refuses to exercise his power, the Court will make an order under the *Settled Estates Act* (z).

Powers already given by an order of the Court under the *Settled Estates Act* are not affected by section 56, and the proper course, if it is desired to supersede them, is to apply under the *Settled Estates Act* for that purpose (a). [Settled Estates Act.]

2. It may be observed that the powers of the trustees for the exercise of which the consent of the tenant for life is required, are those conferred by the settlement, the enactment does not touch general powers exercisable by the trustees *virtute officii*.

3. The effect of the enactment stated shortly is that any special power given to trustees for any of the purposes for which similar powers are given by the *Settled Land Act* to the tenant for life cannot be exercised without his concurrence.

4. By the definition of a tenant for life it is provided that if, in any case, there are two or more persons entitled for life to possession of settled land as tenants in common, or as joint tenants, or for other concurrent estates or interests, they together constitute the tenant for life for the purposes of the Act. And by sect. 58, the limited owners therein specified are to have the powers of a tenant for life, and the provisions of the Act re- [Consent of all tenants for life in possession required by Act of 1882.]

[(y) *Re Duke of Newcastle's Estates*, 24 Ch. D. 129.]

[(z) *Re Mansel's Settled Estates*, W. N. 1884, p. 209.]

[(a) *Re Poole's Settlement*, 32 W. R. 956; 50 L. T. N. S. 585; *Re Barrs-Haden's Settled Estates*, 32 W. R. 194.]

[Consent of one sufficient under Act of 1884.]

ferring to a tenant for life are to extend to each of such limited owners, and reading these provisions with the 56th section, it resulted that where several persons were concurrently entitled as tenants for life, or as such limited owners, in possession to the income of the settled land, the consent of all of them was necessary to the exercise by the trustees of the powers affected by the section. This was found in practice to lead [* 623] * to useless delay and expense, and to remedy the evil it was enacted by the Settled Land Act, 1884 (*b*), that where two or more persons together constitute the tenant for life for the purpose of the Settled Land Act, 1882, then, notwithstanding anything contained in sub-sect. (2) of sect. 56 of that Act, requiring the consent of all those persons, the consent of one only of those persons is by force of that section to be deemed necessary to the exercise by the trustees of the settlement, or by any other person, of any power conferred by the settlement exercisable for any purpose provided for in that Act. And the section applies to dealings as well before as after the passing of the Act.

As the law, therefore, now stands, the trustees can exercise their powers if the concurrence of the tenant for life, or limited owner in possession, of any share of the settled property can be procured.

[Case of trust for sale, or direction to sell.]

5. Hitherto we have been considering the case where there is no trust for sale, or imperative direction to the trustees to sell. Where, however, there is such a trust or direction the case falls within sect. 63 of the Act of 1882, and the right of the trustees to exercise their powers for any purpose for which similar powers are conferred by the Act is subject to restrictions of an entirely different nature, which we proceed now to consider.

[Sect. 63.]

By sect. 63 of the Act of 1882, sub-sect (1), it is provided that any land, or any estate or interest in land, which under or by virtue of any deed, will, or agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of the Act, is subject to a trust or direction for sale of that land, estate, or interest, and for the application or disposal of the money to arise from the sale, or the income of that money, or income of the land until sale, or any part of that money or income, for the benefit of any person for his life, or any other limited period, or

[(*b*) 47 & 48 Vict. c. 18, s. 6 (2).]

for the benefit of two or more persons concurrently for any limited period, and whether absolutely, or subject to a trust for accumulation of income for payment of debts or other purpose, or to any other restriction, shall be deemed to be settled land, and the instrument or instruments under which the trust arises shall be deemed to be a settlement; and the person for the time being beneficially entitled to the income of the land, estate, or interest aforesaid until sale, whether absolutely or subject as aforesaid, shall be deemed to be tenant for life thereof; or if two or more persons are so entitled * concurrently, then those persons shall be [* 624] deemed to constitute together the tenant for life thereof; and the persons, if any, who are for the time being under the settlement trustees for sale of the settled land, or having power of consent to, or approval of, or control over the sale, or if under the settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purpose of that Act, are for the purposes of the Act trustees of the settlement. And by sub-sect. (2), in every such case the provisions of the Act referring to a tenant for life and to a settlement, and to settled land, are to extend to the person or persons aforesaid, and to the instrument, or instruments under which his or their estate or interest arises, and to the land therein comprised, subject to certain exceptions not material to the present purpose.

This obscure section, which cannot but be regarded [Difficulties under the section.] as a most unfortunate enactment, gave rise to many difficulties, and in many cases added considerably to the costs of administering trust estates by unnecessarily obstructing the free disposition by the trustees of property vested in them upon trust for sale. Thus, the effect of the section was, where the proceeds of sale, or any share of the proceeds of sale, were held in trust for a person or several persons concurrently, any of whom had a life or other limited interest, to render various consents necessary (c); and it was a question of difficulty whether, even where the first trust affecting the proceeds of sale was for payment of debts, and the residue only, or a share of such residue, was held

[(c) In *Taylor v. Poncia*, 25 Ch. D. 646, a distinction was drawn between the case where there was an absolute trust for sale at a particular time, without any discretion in the trustees as to the time at which the sale should take place, and the ordinary case of a trust for sale with a discretion in the trustees to postpone the sale, and it was held that in the former case the section did not apply, and the trustees could sell without any consent.]

in trust for persons in succession, such consents could be dispensed with, though the better opinion seems to have been that such consents were in that case unnecessary.

[Remedy
provided by
Settled Land
Act, 1884.]

It is not proposed, however, to discuss what consents were required under the section, as the inconveniences which arose from requiring any consents were found to be so serious, that the legislature intervened, and enacted by the Settled Land Act, 1884, sect. 6, sub-sect. (1), that in the case of a settlement within the meaning of sect. 63 of the Act of 1882, any consent not required by the terms of the settlement is not, by force of anything contained in that Act, to be deemed necessary to enable the trustees of the settlement, or any other person, to execute any of the trusts or [* 625] * powers created by the settlement. And by sub-sect. (3), the section applies to dealings before, as well as after, the passing of the Act. But sect. 7 provides that, with respect to the powers conferred by sect. 63 of the Act of 1882, the following provisions are to have effect :—

(1). Those powers are not to be exercised without the leave of the Court.

(2). The Court may by order, in any case in which it thinks fit, give leave to exercise all or any of those powers, and the order is to name the person or persons to whom leave is given.

(3). The Court may from time to time rescind, or vary, any order made under this section, or may make any new or further order.

(4). So long as an order under this section is in force, neither the trustees of the settlement, nor any person other than a person having the leave, shall execute any trust or power created by the settlement, for any purpose for which leave is, by the order, given to exercise a power conferred by the Act of 1882.

(5). An order under this section may be registered and re registered, as a *lis pendens*, against the trustees of the settlement, named in the order, describing them on the register as "Trustees for the purposes of the Settled Land Act, 1882."

(6). Any person dealing with the trustees from time to time, or with any other person acting under the trusts or powers of the settlement, is not to be affected by an order under this section, unless and until the order is duly registered, and when necessary re-registered as a *lis pendens*.

(7). An application to the Court under this section

may be made by the tenant for life, or by the persons who together constitute the tenant for life, within the meaning of sect. 63 of the Act of 1882.

(8). An application to rescind or vary an order, or to make any new or further order under this section, may be made also by the trustees of the settlement, or by any person beneficially interested under the settlement.

(9). The person or persons to whom leave is given by an order under this section, shall be deemed the proper person or persons to exercise the powers conferred by sect. 63 of the Act of 1882, and shall have, and may exercise those powers accordingly.

(10). This section is not to affect any dealing which has taken place before the passing of this Act, under any trust or power to which this section applies.

7. The effect of these enactments is, that where property is * subject to a trust or direction for sale, [** 626*] [Effect of enactments.] as distinguished from a mere power of sale, the trustees may execute the trust, and exercise their powers irrespective of the restrictions arising under the Settled Land Act, 1882, until an order has been made by the Court giving leave to some other person or persons to exercise all or any of the powers conferred by sect. 63 on the tenant for life; and that until such an order has been made no tenant for life or other limited owner is able, under the Act of 1882, to exercise any power conferred by that Act. But when such an order has been made, and so long as the order remains in force, the trustees cannot execute any trust or power created by the settlement for any purpose to which the leave given by the order extends. The powers under the settlement and the Act will thus never be concurrent, and as every order to be effectual must be registered and re-registered as a *lis pendens*, there will never be any difficulty in ascertaining, by a search for *lites pendentes*, whether the trustees are in a position to execute their trusts and powers. Moreover, as the persons to whom leave is given to exercise the powers "are to be deemed the proper persons to exercise them, and may accordingly exercise them," any person dealing with such persons will acquire a statutory title from them, and will not be under any obligation to ascertain that the leave was properly given.

8. It has been held that, in determining whether land [Instrument creating the trust.] vested in trustees upon trust for sale is subject to the provisions of the Settled Land Act, 1882, the Court must look simply at the instrument which created the trust for sale, and that if at the time when a contract

for sale is entered into by the trustees there is no person who, by virtue of the provisions of *that* instrument, is entitled to the income of the money arising from the sale, or of the land until sale, for his life or any other limited period, sect. 63 does not apply, notwithstanding that, under other instruments subsequent to that creating the trust for sale, there may be tenants for life or persons with other limited interests (*d*). The decision is no doubt a convenient one, but it seems to do considerable violence to the language of the Act, as it is conceived that the words "the instrument or instruments under which the *trust* arises" cannot be properly confined to the instrument or instruments under which the *trust for sale* arises, but must have been intended, and should be construed to extend to all the instruments which together create the *whole trust* affecting the property.]

[(*d*) *Re Earle and Webster's Contract*, 24 Ch. D. 144.]

* CHAPTER XXIV. [* 627]

OF ALLOWANCES TO TRUSTEES.

Now that we have discussed the *duties* of trustees, and the extent of their *powers*, we may next enter upon subjects very closely interwoven with the execution of the office, viz.: First, Allowances to trustees for their *time and trouble*; and Secondly, Allowances to trustees for *actual expenses*.

SECTION I.

ALLOWANCES FOR TIME AND TROUBLE.

1. It is an established rule in general, that a trustee shall have no allowance for his trouble and loss of time, One reason given is, that on these pretences, if admitted, the trust estate might be loaded and rendered of little value; besides the great difficulty there would be in settling and adjusting the *quantum* of such allowance, especially as one man's time may be more valuable than that of another; and there can be no hardship in this respect upon the trustee, for it lies in his own option whether he will accept the trust or not (*e*). The true ground, however, is, that if the trustee were allowed to perform the duties of the office, and to claim compensation for his services, his interest would be opposed to his duty; and as a matter of prudence, the Court would not allow a trustee or executor to place himself in such a false position (*f*)¹.

(*e*) *Robinson v. Pett*, 3 P. W. 251, *per* Lord Talbot; *Gould v. Fleetwood*, cited *Ib.* note (A); *How v. Godfrey*, Rep. t. Finch, 361; *Brocksopp v. Barnes*, 5 Mad. 90; *Ayliffe v. Murray*, 2 Atk. 58; *Re Ormsby*, 1 B. & B. 189, *per* Lord Mannors; *Charity Corporation v. Sutton*, 2 Atk. 406, *per* Lord Hardwicke; *Bonithon v. Hockmore*, 1 Vern. 316, &c.

(*f*) *New v. Jones*, Exch. Aug. 9, 1833, cited 9th Jarm. Prec. 338 *per* Lord Lyndhurst; and see *Burton v. Wookey*, 6 Mad. 368.

¹ This rule has been adopted in Delaware; *State v. Pratt*, 4 Harring, 154; and in the 3d ed. of *Perry on Trusts*, § 916, it is said possibly to prevail in Ohio and Illinois. In all the other States a compensation is allowed the trustee for his time, responsibility and trouble in the management of the funds of the estate and the execution of the trust.

Executors,
mortgagees,
receivers,
committees of
lunatics.

[* 628] * 2. And the rule applies not only to trustees in the strict and proper sense of the word, but to all who are virtually invested with a fiduciary character, as executors and administrators (*g*), mortgagees (*h*), receivers (*i*), committees of lunatics' estates (*k*), a surviving partner (*l*), &c.

Trustees of
West India
estates.

3. But trustees for absentees of estates in the *West Indies* are allowed a commission for their personal care in the management and improvement of the property. However, if, instead of remaining upon the island they commit the management to the hands of agents, the Court will reject the claim; for it would be a strange construction that one allowed a commission on account of the proprietor's absence should insist upon his reward when he had been absent himself (*m*). But a manager, though he forfeits his *commission* during the period of his absence, will be repaid the sums actually disbursed by him for the care of the estate by others, provided the payments he has made be in themselves reasonable and proper (*n*).

Rate of
commission
in Jamaica.

The rate of commission in *Jamaica* has been regulated by several Acts of Assembly; it was originally 10*l*. per cent. upon the receipts, then 8*l*. per cent., and since 6*l*. per cent. (*o*). But the intention of the Legislature was only that the rate should not exceed 6*l*. per cent. not that under particular circumstances it might not be a great deal less (*p*)¹.

(*g*) *Scattergood v. Harrison*, Mos. 128; *How v. Godfrey*, Rep. t. Finch, 361; *Sheriff v. Axe*, 4 Russ. 33.

(*h*) *Bonithon v. Hockmore*, 1 Vern. 316; *Langstaffe v. Fenwick*, 10 Ves. 405; *French v. Baron*, 2 Atk. 120; *Carew v. Johnston*, 2 Sch. & Lef. 301; *Arnold v. Garner*, 2 Ph. 231; *Matthison v. Clarke*, 3 Drew. 3; *Barrett v. Hartley*, 12 Jur. N. S. 426. Mortgagees were also disabled formerly by the effect of the usury laws from claiming anything beyond their principal and legal interest.

(*i*) *Re Ormsby*, 1 B. & B. 189.

(*k*) *Anon. case*, 10 Ves. 103; *Re Walker*, 2 Ph. 630; *Re Westbrook*, Ib. 631.

(*l*) *Burden v. Burden*, 1 V. & B. 170; *Stocken v. Dawson*, 6 Beav. 371.

(*m*) *Chambers v. Goldwin*, 9 Ves. 273.

(*n*) *Forrest v. Elwes*, 2 Mer. 68.

(*o*) *Chambers v. Goldwin*, 9 Ves. 267.

(*p*) See S. C. Id. 257.

¹ In New York, New Jersey, South Carolina and Georgia, the amount of commissions to be allowed the trustee is regulated by statute. In most, if not all of the other States, the allowance of commissions lies entirely within the discretion of the Court, and the rate varies in the different States, depending, however, in each, on the size of the estate, the nature of the property, and the trouble of the trustee. See Perry on Trusts (3d ed.) § 918.

Mortgagees in possession of estates in Jamaica are, by the Act referred to, expressly prohibited from charging any commission, except what they may have themselves paid by way of commission to a factor (*q*); and, without regard to statutory prohibition, mortgagees in possession of West Indian property are under the same disability of charging commission as if the property were situate in this country (*r*).

Mortgagees
in possession
of West
India
estates.

4. An executor appointed in the *East Indies* and administering in that country, and then returning to England, is, if called upon in a Court of Equity to render an account, allowed a commission * of 5 per [**629*] cent. upon the receipts or payments, [where according to the practice of the Indian Courts a similar allowance would be made in India.] The appointment of an executor in the East Indies is considered the appointment of an agent for the management of the estate. Without such an allowance, where a person dies in India deprived of the presence of his relations, the effects of the testator might often not be collected at all. Besides, the executors in England could scarcely procure a person to undertake the office at any cheaper rate (*s*). If an Indian executor, after collecting part

Executor in
the East
Indies.

(*q*) See S. C. 5 Ves. 837; 9 Ves. 268.

(*r*) *Leith v. Irvine*, 1 M. & K. 277; see *Chambers v. Davidson*, 1 L. R. P. C. 296.

(*s*) *Chetham v. Lord Audley*, 4 Ves. 72; *Matthews v. Bagshaw*, 14 Beav. 123. To the latter case is appended the following note:—

“The custom of allowing a commission to executors and administrators in the presidency of *Bengal* has been abolished by Act No. VII., of 1849, of the Governor-General in Council. By that Act an Administrator-General has been appointed in place of the Ecclesiastical Registrar, with a reduced commission of 3 per cent. on monies distributed or invested in manner therein provided.

“By Act No. II., of 1850, the provisions of the above Act, with certain restrictions, are extended to the presidencies of *Madras* and *Bombay*, but the rate of commission to the public administrator is there to remain 5 per cent. until altered to 3 per cent. by the Governor and Council in each of these presidencies.”

[By Act No. II., of 1874, sect. 56. No person other than the Administrator-General acting officially is to receive or retain any commission or agency charges, for anything done by the executor or administrator under any probate or letters of administration or letters *ad colligenda bona* which have been granted by the Supreme Court, or High Court at Fort William in Bengal, since the passing of the Act No. VII. of 1849, or by either of the Supreme or High Courts at Madras and Bombay, since the passing of the Act No. II. of 1850, or which have been or shall be granted by any Court of competent jurisdiction within the meaning of sections 187 and 190 of the Indian Succession Act, 1865. But

of the assets, comes over to this country, he is allowed a commission on those assets only that were collected by himself in India, and not on the assets subsequently collected by his agents and transmitted to this country, for the Courts here allow the commission because the Indian Courts allow it, and the Indian Courts allow it on the ground of residence in India (*t*).

Where he has a legacy for his trouble.

An executor in India is only allowed the commission where the testator himself has not left him a legacy for his trouble (*u*); but if the amount of the legacy be an inadequate compensation for the duties of the office, it seems the executor, so as he signify his resolution in proper time, may renounce the intended legacy, and take advantage of the commission (*v*).

Constructive trustees.

5. A person who has carried on a business with another man's money under circumstances which make [* 630] him liable to account for * profits, will be allowed a compensation for his *skill and exertions* in the management of the concern (*w*).

Express trustee has no allowance for management of a trade.

6. But a person will not be permitted, except under very special circumstances (*x*), to charge anything for his management of a trade or business, where he has been clothed in *express* terms with the character of a trustee or executor (*y*).

Solicitors.

7. A *solicitor* who sustains the character of trustee will not be permitted to charge for his time, trouble, or attendance, but only for his actual disbursements (*z*). Lord Lyndhurst observed, "It would be *placing his interest at variance with the duties he has to discharge*. It is said, the bill may be taxed, but that would not be a sufficient check; the estate has a right not only to the protection of the taxing officer, but also to the vigilance and guardianship of the executor or trustee: a trustee

this enactment is not to prevent any executor or other person from having the benefit of any legacy bequeathed to him in his character of executor or by way of commission or otherwise.]

(*t*) *Campbell v. Campbell*, 13 Sim. 168; and see 2 Y. & C. C. C. 607.

(*u*) *Freeman v. Fairlie*, 3 Mer. 24.

(*v*) See *Id.* 28.

(*w*) *Brown v. De Tastet*, Jac. 284; and see Sir Samuel Romilly's argument in *Crawshay v. Collins*, 15 Ves. 225; and *Wedderburn v. Wedderburn*, 22 Beav. 84. To this principle must also be referred the decision in *Brown v. Litton*, 1 P. W. 140; 10 Mod. 20.

(*x*) *Forster v. Ridley*, 4 N. R. 417; S. C. 4 De G. J. & S. 452.

(*y*) *Stocken v. Dawson*, 6 Beav. 371; *Burden v. Burden*, 1 V. & B. 170; *Brocksope v. Barnes*, 5 Mad. 90. See *Marshall v. Holloyay*, 2 Sw. 432.

(*z*) *New v. Jones*, Excheq. Aug. 9, 1833, 9 Jarm. Prec. 338. See the result of the various decisions stated at p. 281, *supra*.

placed in the situation of a solicitor might, if allowed to perform the duties of a solicitor and to be paid for them, find it very often proper to institute and carry on legal proceedings, which he would not do, if he were to derive no emolument from them himself, and if he were to employ another person" (a).¹

8. If a *cestui que trust* settle accounts with a trustee, who is a solicitor, and execute a general release, and the accounts contain items of charges for professional services, the *cestui que trust*, if he had no legal advice, and was not expressly informed, that professional services might have been disallowed, may open the accounts as regards the objectionable items (b); but if the *cestui que trust* had independent legal assistance, he is bound by the release (c). Settled accounts.

9. The doctrine against professional charges by a trustee, who is a solicitor, is so rigidly applied, that where a security has been given for payment of such professional charges, it may be set aside, even as against a purchaser for valuable consideration, if he had notice (d). Purchaser.

10. The rule against allowances to trustees is merely a general * one in the absence of express directions to the contrary; for there is no objection to the settlor himself directing compensation to the trustee for his services, either by the gift of a sum in gross, or by the allowance of a salary (e).² Allowance directed by the settlor.

11. And if a testator give an executor a salary for his trouble the allowance will not cease on the institution of a suit; for though the management be thenceforward under the direction of the Court, the executor is still called upon to assist the Court in the administration with his care and vigilance (f). If the executor be wholly incapacitated, even by the act of God, from discharging the duties of executor (g), and a Allowance does not cease on institution of a suit.

(a) *New v. Jones*, 9 Jarm. Prec. 338.

(b) *Todd v. Wilson*, 9 Beav. 486.

(c) *Stanes v. Parker*, 9 Beav. 385; *Re Wyche*, 11 Beav. 209.

(d) *Gomley v. Wood*, 3 Jon. & Lat. 678.

(e) *Webb v. Earl of Shaftsbury*, 7 Ves. 480; *Robinson v. Pett*, 3 P. W. 250, per Sir J. Jekyll; *Willis v. Kibble*, 1 Beav. 559.

(f) *Baker v. Martin*, 8 Sim. 25; see ante p. 598.

(g) *Re Hawkin's Trusts*, 33 Beav. 570; *Hanbury v. Spooner*, 5 Beav. 630.

¹ In the United States so far has the doctrine laid down in the text been abandoned that an allowance for professional services, even in addition to the ordinary commissions, has been made to an attorney who sustains the character of trustee.

² If the instrument of settlement show an intention on the part of the settlor that the trustee shall not be compensated, the court will not allow a compensation, *Mason v. Roosevelt*, 5 Johns. Ch. 534.

fortiori if the executor, being capable, do not act when there was nothing to prevent his acting (*h*), he cannot claim a legacy given to him for his trouble in the executorship (*i*), and an annuity, limited to a trustee during the continuance of his office, cannot be claimed when the duties of the office have ceased by the absolute vesting of the property (*k*).

Amount of allowance not expressed.

12. Where the settlor has directed a remuneration to the trustee, but has not declared the *amount*, a reference will be directed to settle the *quantum meruit*, according to the circumstances of the case (*l*).

Contract for an allowance with the *cestui que trust*.

13. The trustee may also, at the time of accepting the trust, *contract* for an allowance or remuneration for his services (*m*); but bargains of this kind are watched by the Court with exceeding jealousy (*n*), and must be freely made and not submitted to from pressure (*o*), and where the person about to become trustee and bargaining for remuneration is a solicitor, who is *acting as such in the preparation of the instrument of trust which purports to confer the right of remuneration*, there would seem to be considerable difficulty in upholding the contract unless the client had independent professional advice, or unless, at all events, the solicitor can show that the precise nature of the arrangement was distinctly explained to the client (*p*).

Terms of the contract must be fulfilled to the letter.

14. Where the contract is valid originally, the conditions of it must be *fulfilled to the letter*, or the trustee [** 632*] is not entitled to his ** reward*. An executor, who had no legacy, and where the execution of the trust was likely to be attended with trouble, agreed with the residuary legatees, in consideration of 100 guineas, to act in the executorship. He died before the execution of the trust was completed, and his executors brought a bill to be allowed those 100 guineas out of the trust money in their hands; but the Court said all bargains of this kind ought to be discouraged, as tending to eat up the trust, and here the executor had died

(*h*) *Slaney v. Witney*, 2 L. R. Eq. 418.

(*i*) *Re Hawkins' Trusts*, 33 Beav. 570; *Hanbury v. Spooner*, 5 Beav. 630.

(*k*) *Hull v. Christian*, 17 L. R. Eq. 546.

(*l*) *Ellison v. Airey*, 1 Ves. 111, see 115; and, see *Willis v. Kibble*, 1 Beav. 559.

(*m*) *Re Sherwood*, 3 Beav. 338; *Douglas v. Archbutt*, 2 De G. & J. 148.

(*n*) *Ayliffe v. Murray*, 2 Atk. 58.

(*o*) *Barrett v. Hartley*, 12 Jur. N. S. 426.

(*p*) *Moore v. Frowd*, 3 M. & Cr. 48.

before he had finished the affairs of the trust; and so the plaintiffs' demand was disallowed (*q*).

15. A trustee dealing with the *Court*, is at liberty, before accepting the trust, to stipulate for any remuneration which the Court may choose to give him (*r*). But if he omit to contract with the Court before entering upon his duties, he will have great difficulty in obtaining compensation afterwards, and we may add that in no case will the Court remunerate a trustee for his trouble by permitting him to make *professional charges* where the settlor has not so directed, but will compensate him for his trouble, if at all, by a regular and fixed salary (*s*). Contract for an allowance with the Court.

16. During the continuance of the usury laws a *mortgagee* could not, as a general rule, have bargained for a compensation exceeding together with the actual interest the legal rate, for an agreement of this kind would have tended to usury (*t*). But after a long struggle certain special exceptions were established in favour of mortgagees *not in possession* of West Indian estates (*u*). Mortgagee.

17. As a trustee will not be permitted to charge for his personal care and loss of time, it is but just he should be allowed on proper occasions to call in the assistance of *agents* at the expense of the estate¹. Employment of agents.

18. Thus a trustee, though he may not act as a collector himself with a commission (*v*), may, if the case require it, appoint a *collector of rents* (*w*), [or of book debts (*x*),] at a commission. Collector of rents.

19. As a man is not bound to be his own *bailiff*, if a trustee * employ a skillful person in that [* 633] capacity, the salary must be allowed (*y*); at least the Bailiff.

(*q*) Gould v. Fleetwood, cited Robinson v. Pett, 3 P. W. 251, note (A).

(*r*) Marshall v. Holloway, 3 Sw. 452, 453; Newport v. Bury, 23 Beav. 30; Brocksopp v. Barnes, 5 Mad. 90; per Sir J. Leach; and see Morison v. Morison, 4 M. & Cr. 215.

(*s*) Bainbrigge v. Blair, 8 Beav. 588. See the observations of Lord Langdale, pp. 595, 596.

(*t*) See Chambers v. Goldwin, 9 Ves. 271.

(*u*) See the history of the struggle detailed in Lord Brougham's judgment in Leith v. Irvine, 2 M. & K. 277.

(*v*) Nicholson v. Tutin, 3 K. & J. 159.

(*w*) Davis v. Dendy (the case of a mortgagee), 3 Mad. 170; Stewart v. Hoare, 2 B. C. C. 633; and see Wilkinson v. Wilkinson, 2 S. & S. 237; Re Westbrooke, 2 Ph. 631.

[*x*] Re Brier, 26 Ch. D. 238.]

(*y*) Bonithon v. Hockmore, 1 Vern. 316; Chambers v. Goldwin, 9 Ves. 272, per Lord Eldon.

¹ Kennedy's App., 4 Barr, 150; Wade v. Pope, 44 Ala. 690.

Court will grant that indulgence where the estate is at such a distance that the trustee must have appointed a bailiff had the estate been his own (z).

Attorney.

20. An executor employed a person who had been his clerk to transact some business for him relative to the testator's affairs, and the Master insisted it was the executor's own duty, and refused to allow the expense. But Lord Hardwicke said, "it was clear that if an executor paid an *attorney* for his trouble and attendance in the management of the estate, he ought to be repaid the sums he had so disbursed," and ordered a reference to the Master to tax the items of the bill (a).

Accountant.

21. If the accounts be complicated, and the executor or trustee take upon himself to adjust and settle them, although it may occupy a great deal of his time and attention, the principle of equity is that he cannot claim a compensation; but if he choose to save his own trouble by the employment of an *accountant*, he is entitled to charge the trust estate with it under the head of expenses (b).

Weiss v. Dill.

22. In *Weiss v. Dill* (c) the executor of a trader had employed an agent to *collect debts*, which were numerous and only paid after repeated applications, at a commission of 5 per cent. The Master had reduced the commission to $2\frac{1}{2}$ per cent.; and, the executor upon that ground taking an exception to the report, Sir J. Leach said, "Executors, generally speaking, are not allowed to employ an agent to perform those duties which, by accepting the office of executors, they have taken upon themselves; but there may be very special circumstances in which it may be thought fit to allow them the expenses they have incurred in the employment of agents; I have some doubt whether in this case the Master ought to have made *any* allowance, but with the allowance of $2\frac{1}{2}$ per cent. the executor must be content." The observations of Sir J. Leach might seem at first either to cast doubt upon the general right of a trustee to employ salaried agents in fitting cases, or to establish a distinction between the collection of *debts* and the collection of *rents*, but it cannot be supposed that his Honour intended to reverse his pre-
[* 634] * viously expressed views on the general

(z) *Godfrey v. Watson* (as to a mortgage) 3 Atk. 518, *per* Lord Hardwicke.

(a) *Macnamara v. Jones*, 2 Dick. 587.

(b) *New v. Jones*, Exch., Aug. 9, 1833, cited 9 Jarm. Prec. 335; *Henderson v. M'Iver*, 3 Mad. 275.

(c) 3 M. & K. 26; and see *Giles v. Dyson*, 1 Stark. N. P. C. 32; *Hopkinson v. Roe*, 1 Beav. 180; *Day v. Croft*, 2 Beav. 488.

principle (*d*), and there seems no ground for any such distinction as that adverted to. The decision in substance was, that the Court declined to over-rule the Master's opinion on the question of *quantum*.

SECTION II.

ALLOWANCES TO TRUSTEES FOR EXPENSES.

1. THOUGH a trustee is allowed nothing for his *trouble*, General rule. he is allowed everything for his *expenses out of pocket* (*e*). "It flows," said Lord Eldon, "from the nature of the office, whether expressed in the instrument or not, that the trust property shall reimburse him all the charges and expenses incurred in the execution of the trust" (*f*).¹ Even where trustees had been *wrongfully appointed* but acted *bonâ fide*, and believed themselves to have been duly appointed, they were allowed their costs, charges, and expenses, notwithstanding the defect of title (*g*).²

2. A trustee will be entitled to be reimbursed his Travelling *travelling* expenses (*h*), provided they be properly in- expenses. curred (*i*).³

3. Trustees are justified in employing a *solicitor* for Employment of solicitor.

(*d*) See *Wilkinson v. Wilkinson*, 2 S. & S. 237; [*Re Brier*, 26 Ch. D. 238.]

(*e*) *How v. Godfrey*, Rep. t. Finch. 361; *Re Ormsby*, 1 B. & B. 190, *per* Lord Manners; *Hide v. Haywood*, 2 Atk. 126; *Caffrey v. Darby*, 6 Ves. 497, *per* Sir W. Grant; *Godfrey v. Watson*, 3 Atk. 518, *per* Lord Hardwicke; *Fooffees of Heriot's Hospital v. Ross*, 12 Cl. & Fin. 512, 515, *per* Lord Cottenham.

(*f*) *Worrall v. Harford*, 8 Ves. 8; and see *Dawson v. Clarke*, 18 Ves. 254; *Attorney-General v. Mayor of Norwich*, 2 M. & Cr. 424; *Morison v. Morison*, 7 De G. M. & G. 214.

(*g*) *Travis v. Illingsworth*, W. N. 1868, p. 206.

(*h*) *Ex parte Lovegrove*, 3 D. & C. 763; and see *Ex parte Elsee*, 1 Mont. 1; *Ex parte Bray*, 1 Rose, 144. These were cases of assignees who, by 6 G. 4. c. 16, s. 106 (the Bankrupt Act then in force), were to have "all just allowances," but trustees are equally entitled to all just allowances *virtute officii*; see *Blackford v. Davis*, 4 L. R. Ch. App. 305.

(*i*) *Malcolm v. O'Callaghan*, 3 M. & Cr. 62; and see *Bridge v. Brown*, 2 Y. & C. C. C. 181.

¹ *Hatton v. Weems*, 12 Gill. & J. 83; *R. & S. R. R. Co. v. Miller*, 47 Vt. 146; *Morton v. Barrett*, 22 Me. 257; *Perkins v. Kershaw*, 1 Hill's Eq. 350.

² So where the trust is void, if the trustees be without blame, *Re Wilson*, 4 Barr. 430; *Hawley v. James*, 16 Wind. 61.

³ *Towle v. Mack*, 2 Vt. 19.

the better conduct of the trust (*k*).¹ And a trustee is entitled to be paid all costs properly incurred for which he is liable to the solicitor so employed; as where two executors, defendants in an administration suit, gave a *joint retainer* to a firm of solicitors, and one of the executors became bankrupt and was a debtor to the estate, it was held that the other executor, being [* 635] liable for the whole costs under *the joint retainer, was entitled to the whole costs as against the estate (*l*). [But this case has been dissented from by the late M.R., who held, in a similar case, that the solvent executor should be allowed only his own proportion of the costs up to the bankruptcy out of the estate, the defaulter's proportion being set off against the debt due from him, but that the costs incurred by both subsequently to the bankruptcy should be allowed in full (*m*). And this view has since been approved (*n*). The proportion of the common costs which should be allowed to the solvent trustee is a matter for the Taxing Master (*o*).] And the sums paid will, at the instance of the *cestuis que trust*, though not liable to taxation, be looked over and moderated (*p*). And trustees, if they employ one of themselves as solicitor, instead of engaging a third person, will be answerable for all the consequences, if they be misled by the professional advice of such trustee solicitor (*q*).

(*k*) *Macnamara v. Jones*, Dick. 587.

(*l*) *Watson v. Row*, 18 L. R. Eq. 680.

(*m*) *Smith v. Dale*, 18 Ch. D. 516; this case probably referred to a bankruptcy under the law as it existed prior to the Act of 1869, as under that Act the bankrupt trustee would not have been entitled to his costs after the bankruptcy until he had made good his default. See *post*, Chap. xxxii, s. 5.]

(*n*) *McEwan v. Crombie*, 25 Ch. D. 175.]

(*o*) *Smith v. Dale*, *McEwan v. Crombie*, *ubi supra*.]

(*p*) *Johnson v. Telford*, 3 Russ. 477; *Langford v. Mahony*, 2 Conn. & Laws 317.

(*q*) *Alton v. Harrison* (a legatee's suit), and *Poyser v. Harrison* (a residuary legatee's suit), both which were consolidated and heard before V. C. Sir J. Stuart on 6th and 8th June, 1868. The testatrix, who died in 1851, devised her real and personal estate to two trustees, Ingle and Harrison (the former a solicitor, the latter a manufacturer), upon the usual trust for sale and conversion. And as to the residue after payment of legacies and annuities to invest upon sufficient securities in trust for a class of persons. The trustees lent 500*l.* upon mortgage to one Thornley, and another 500*l.* to one Walker, and in 1853 Ingle died insolvent. It afterwards turned out that both Thornley's security and Walker's security were second mortgages, and the whole money was lost. Ingle had been solicitor of the testatrix, and

¹ *McElhenny's App.* 46 Pa. St. 347; *Brady v. Dilley*, 27 Md. 570.

*4. So a trustee may give *fees to counsel* [* 636] Fees to
and shall have allowance thereof (r). counsel.

[5. And a trustee will be allowed the costs of opposing [Costs of
a bill in Parliament which affects the trust estate (s). opposing Bill
in Parli-
ment.]

And the Court will sanction the payment by the trustees of settled estates of costs which have been properly incurred by the tenant for life for the protection of the estates, whether as plaintiff or as defendant (t). [Of protect-
ing the
estate.]

The Settled Land Act, 1882, expressly authorizes trustees of a settlement to reimburse themselves or pay

had made her will and acted as solicitor to the trust. The plaintiffs sought to make Harrison liable for the two sums of 500*l.* each as lent upon insufficient security. Harrison declared on oath that the value of the mortgaged property, free from incumbrances, was personally known to him, and was far in excess of the loan, and that the loss had arisen not from the inadequacy of value, but from the defect of title, viz., in the two mortgages being second mortgages; that when the advances were made he fully believed that in each case the security was a first mortgage, and that he had relied as to the title upon the legal advice of Ingle, who had fraudulently represented the security as a fit and proper one; that the trustees had a right to employ one of themselves as solicitor to the trust (though no professional profits could be allowed), and that Harrison was entitled to the same protection from the legal advice given by Ingle, as if the trustees had employed a third person as solicitor, who had approved the title on their behalf. However, the Vice-Chancellor ruled that two trustees, one of whom was a solicitor, were liable to all the consequences if they employed one of themselves as such solicitor, instead of calling in a third person; and his Honour put the case of a single trustee, a solicitor, and asked whether it could be contended that such trustee was not liable for the consequences if he acted without other professional advice, and his Honour decided that Harrison was made liable for both the sums lent. This point seems to have arisen for the first time, and the judgment of the V. C. may be supported on principle; for if two persons be appointed trustees, they ought in matters of title to take professional advice, and for that purpose to employ a competent solicitor; but the selection of a proper legal adviser must be the *joint* act of the two, and as a man cannot be judge in his own case, they cannot appoint one of themselves to the office. *A fortiori* if there be a single trustee, a solicitor, he cannot act himself as solicitor and claim the same protection as if had appointed another. When a settlor appoints a person a trustee, who is also a solicitor, he does not in the absence of any special direction, mean him also to act as solicitor; for a person may be a very good trustee and yet a very bad solicitor. The settlor selects his trustee, not because he is a solicitor or valuer, or fills any other scientific capacity, but because he is a person to be trusted with the property and capable of managing it with the aid of professional advice.

(r) Cary, 14; Poole v. Pass, 1 Beav. 600.

[(s) *Re Nicoll's Estates*, W. N. 1878, p. 154.]

[(t) *Re Earl de la Warr's Estates*, 16 Ch. D. 587; 51 L. J. N. S. Ch. 407; *Re Lord Rivers' Estate*, 16 Ch. D. 588, n. And see 45 & 46 Vict. c. 38, s. 36.]

and discharge out of the trust property all expenses properly incurred by them (u).]

Extra costs.

6. And if a trustee be sued by a stranger concerning the trust, and have his costs paid him as between *party and party*, and the *cestui que trust* afterwards institute proceedings for an account, the trustee will be allowed his necessary costs in the former suit, and will not be concluded by the amount of the taxation (v)¹; and if a trustee as defendant be ordered to pay the plaintiff's costs, he will, unless he has forfeited his right by some misconduct, be entitled *as between him and his cestui que trust* to be reimbursed the costs which he has paid, and also those which he has himself incurred (w). The fact of a trustee having been unsuccessful in litigation, either as plaintiff or defendant, will not in the absence of misconduct disentitle him to be reimbursed his costs (x), but a trustee will have no claim to reimbursement out of the trust fund, where the legal proceedings were occasioned by his own negligence in the [* 637] first instance (y)²; or were improperly instituted by himself (z)³; and a trustee will not be allowed, without question, whatever sums by way of costs he may have paid his solicitor; for the bill, as between trustee and *cestui que trust*, though not submitted to a regular taxation (which is between solicitor and client), will be moderated by the Court by a deduction of such charges as may appear irregular and excessive (a); and the trustees will not be allowed in-

[(u) S. 43.]

(v) *Armand v. Bradburne*, 2 Ch. Ca. 138; *Ramsden v. Langley*, 2 Vern. 536; and see *Fearn v. Young*, 10 Ves. 184.

(w) *Lovat v. Fraser*, 1 L. R. H. L. Sc. 37, *per* Lord Kingsdown.

(x) *Courtney v. Rumley*, 6 I. R. Eq. 99.

(y) *Caffrey v. Darby*, 6 Ves. 497; *Courtney v. Rumley*, 6 I. R. Eq. 99.

(z) *Peers v. Ceeley*, 15 Beav. 209; *Leedham v. Chawner*, 4 K. & J. 458.

(a) *Johnson v. Telford*, 3 Russ. 477; *Allen v. Jarvis*, 4 L. R. Ch. App. 616. As to the right of the *cestui que trust* to obtain a taxation as against the solicitor, see *Re Drake*, 22 Beav. 438; *Re Dickson*, 3 Jur. N. S. 29, and cases there cited; *Re Dawson*, 28 Beav. 605; *Re Press*, 35 Beav. 34; *Re Brown*, 4 L. R. Eq. 464, in which it was held, that the costs are to be taxed as between solicitor and client; but that if not proper having regard to the nature of the trust, they can only be recovered from the trustee personally, and are not chargeable as between the solicitor and the *cestui que trust*.

¹ *Downing v. Marshall*, 37 N. Y. 380.

² *Lathrop v. Smalley*, 23 N. J. Eq. 192; *Kent v. Hutchins*, 50 N. H. 92.

³ *Brinton's Est.* 10 Barr. 408. If he refuse to account, he is chargeable with costs; *Burnham v. Dalling*, 7 Green (N. J.) 310.

terest on the costs, though at the time he paid them he had no trust monies in his hands (b). Interest not allowed.

[7. Where a bill was filed to set aside a decree for a compromise on the ground of personal fraud in one of the trustees in obtaining the decree, but the charge of fraud was disproved, and the bill dismissed with costs to be paid by the next friend of the plaintiff, who, however, was unable to pay them, it was held that the trustee was entitled to have his costs discharged out of the trust estate, for the defence was by him not on his own behalf but for the benefit of the trust estate, and his right was not affected by the fact that his character was incidentally cleared in the suit (c).] [Costs of trustee defending his conduct in the trust.]

8. Even a specific remuneration given by the testator to his trustees for their services in the trust is no reason for excluding them from the usual allowance for *expenses*. A testator bequeathed to his acting trustees for the time being the yearly sum of five guineas apiece for the care and trouble they might have in the execution of the trust. The testator's estates consisted in part of about fifty houses in London, thirty-four of which were let to weekly tenants. The trustees employed a person to collect the rents, and Sir John Leach said, "The annuity was given to them as a recompense for the care and trouble which would attend the due execution of the office; and if it was consistent with the due execution of the office to employ a collector, they were entitled to the annuity. A provident owner might well employ a collector in *such a case, and [* 638] the labour of such a collection could not be imposed on the trustee" (d). Allowance for expenses besides remuneration for trouble.

9. A regular account of the expenses should invariably be kept; ¹ but where this has not been done the Court has ordered a *reasonable allowance* to be made in the gross, at the same time taking care that the remissness and negligence of the trustee in not having kept any account should not meet with any encouragement. Thus in *Hethersell v. Hales* (e) the trustee put Amount of expenses.

(b) *Gordon v. Trail*, 8 Price, 416. But if he pays off a debt carrying interest, he stands in the place of the creditor in respect of interest; *Re Beulah Park Estate*, 15 L. R. Eq. 43; *Finch v. Pescott*, 17 L. R. Eq. 554.

[(c) *Walters v. Woodbridge*, 7 Ch. D. 504.]

(d) *Wilkinson v. Wilkinson*, 2 S. & S. 237; and see *Webb v. Earl of Shaftesbury*, 7 Ves. 480; *Fountaine v. Pellet*, 1 Ves. jun. 337.

(e) 2 Ch. Rep. 158.

¹ *Green v. Winter*, 1 Johns. Ch. 27; *Ex parte Cassell*, 5 Watts, 442.

in a general claim for 2500*l.*, apparently an average estimate of the expenses he had incurred in the trust. "The Court," says the reporter, "took some time to deliberate what was fit to be allowed in a matter of this nature; and having considered that the trustee was a friend to the family, and undertook the trust at their great importunity, and that he had incurred the charge of surveying the whole estate, selling and letting the same, looking after tenants, adjusting their accounts, calling in their rents, returning monies to creditors, and treating with them and stating their debts, and procuring and agreeing with purchasers, and for law charges, and for keeping servants and horses, and employing others in journeys to London and elsewhere, and his care there lying from home a long time, the Court was of opinion that the trustee might well deserve the whole 2500*l.*, yet would not allow but 2000*l.*, which the trustee was to have."

Extraordin-
ary outlay.

10. As it is a rule that the *cestui que trust* ought to so save the trustee harmless from all damages relating to the trust, so within the reason of the rule, where the trustee has honestly and fairly, without any possibility of being a gainer, laid down money by which the *cestui que trust* is discharged from a loss, or from a *a plain and great hazard of it*, the trustee ought to be repaid (*f*). So where a trustee employed a bailiff to fell some trees, and the woodcutter allowed a bough to fall on a passer by, who was injured, and recovered damages from the trustee, it was held that as the trustee had meant well, had acted with due diligence, and had employed a proper agent to do an act which was within the sphere of the trustee's duty, and the agent made a mistake, the trustee was entitled to charge the damages on the trust estate (*g*).

[Expenses of
carrying on a
business.]

[11. If a trustee is authorized to carry on a business [* 639] and to * employ certain specific property for that purpose, the creditors of the business have a right to the benefit of indemnity and lien which the trustee has against the property devoted to the business; but this right is subject to any equities subsisting between the trustee and the *cestui que trust* of the specific property; and where the trustee is in default and is not en-

(*f*) *Balsh v. Hyham*, 2 P. W. 455, *per* Lord King; and see *Attorney-General v. Mayor of Norwich*, 2 M. & Cr. 424; *Attorney-General v. Pearson*, 2 Coll. 581; *Quarrell v. Beckford*, 1 Mad. 282; *Sandon v. Hooper*, 6 Beav. 246; *Bright v. North*, 2 Ph. 216; *James v. May*, 6 L. R. H. L. 328.

(*g*) *Benett v. Wyndham*, 4 De G. F. & J. 259.

titled to indemnity except upon the terms of making good the default, the creditors will have no right to indemnity except upon the same terms (*h*). But where the trustee for sale of a business carries on the business without authority for the benefit of the *cestuis que trust*, and incurs liabilities to tradesmen in so doing, there is no right in the creditors to come against the trust estate, but they must look to the trustee personally (*i*).]

12. The expenses incurred by a trustee in the execution of his office are treated by the Court as a first charge or *lien* upon the estate, and the *cestui que trust* or his assign cannot compel a conveyance in equity without a previous satisfaction of the trustee's just demands (*k*), and in a suit for the administration of the

Expenses a
lien on the
estate.

[*(h)* *Re Johnson*, 15 Ch. D. 548; *Ex parte Garland*, 10 Ves. 110; *Re Sumner*, W. N. 1884, p. 121; *Gallagher v. Ferris*, 7 L. R. Ir. 489. These authorities proceed on this principle, that where a particular part of a trust estate is specifically dedicated to a particular purpose which involves trade debts and liabilities, it is a trust to use it for that particular purpose, and the trustee, though personally liable for the debts which he contracts in the course of the business, has a right to be paid out of the specific assets appropriated for that purpose, and the trade creditors are not to be disappointed of payment so far as the assets so appropriated are concerned, *per Selborne*, L. C., *Strickland v. Symons*, 26 Ch. D. 248; and see *Boylan v. Fay*, 8 L. R. Ir. 374.]

[*(i)* *Strickland v. Symons*, 22 Ch. D. 666; affirmed, 26 Ch. D. 245.]

[*(k)* See *Ex parte James*, 1 D. & C. 272; *Hill v. Magan*, 2 Moll. 460; *Norwich Yarn Company*, 22 Beav. 143; *Ex parte Chippendale*, 4 De G. M. & G. 19; *Re Exhall Coal Company*, 35 Beav. 449; *Oliver v. Osborn*, W. N. 1867, p. 245; *Re Layton's Policy*, W. N. 1873, p. 49.

In *Trott v. Dawson*, 1 P. W. 780, Lord Macclesfield said, "Dawson, the assignee of Archdale, cannot be in a better case than Archdale under whom he claims. Wherefor, as Archdale, would not have had the assistance of a Court of Equity without paying for the charge and trouble which Trott had been at in relation to the trust, so, by parity of reason, the defendant Dawson, as claiming under Archdale, must do the same thing which it was incumbent upon Archdale to have done."

But the decision in this case was reversed in the House of Lords; and hence the inference has been drawn that a trustee gives credit for the expenses, not to the estate, but to the person of the *cestui que trust*, and that the assignee is not liable for the trustee's expenses incurred in the time of the assignor. The case is reported much more at length in *Brown*, 7 B. P. C. 266, and the circumstances were briefly these:—An eighth of the proprietorship of the province of Carolina had been conveyed in 1684 to Amy in trust for four persons. The whole equitable interest had become subsequently vested in John Archdale, who settled it upon Dawson and his wife. Dawson filed a bill against the co-heirs of Amy for a conveyance; and the question between the

[* 640] fund * in respect of which he expenses have been incurred, the lien of the trustee will be paid even before the costs of suit (*l*). [And the expenses are a first charge as well upon the income as upon the corpus of the estate, and the trustees have therefore the right to retain their expenses out of the income until provision can be made for raising them out of the corpus (*m*).] But the trustee of a void trust deed cannot charge his expenses as against persons who establish the invalidity of the deed (*n*)¹, though he will be allowed for improvements (*o*). There will be no lien for expenses incurred by trustees in respect of an act done in excess of their powers, and therefore in breach of their duty (*p*). And the Court has refused to give effect to a trustee's lien by a foreclosure decree, or a sale, which would be the destruction of the trust itself; but the Court has gone as far as it could by delivering the deeds into his custody and prohibiting any disposition of the property without previous discharge of the trustee's lien (*q*).

parties was, whether the expenses incurred by Amy ought or not to be first paid and satisfied. On a reference to the Master it was found that Amy had been active in the trust from 1684 to 1697, and during that time had expended various sums of money; that the proprietors of the province had ordered Amy one grant of 12,000 acres; had created him Landgrave, with a further grant of 48,000 acres; and had also presented him with one of the eight proprietorships, which had fallen in by the death of a proprietor without heirs. It was entered on the books of the proprietors in 1698, that the grants had been made to Amy for his services generally, and particularly for his faithful discharge of the trust; that Amy had agreed to convey the estate on request to W. J., who was to succeed him in the office, and by whom subsequently the trust was exclusively managed. It did not appear that the first two grants had ever been perfected, or had become beneficial; but the grant of the proprietorship had been accepted and acted upon. It was under these circumstances that Lord Macclesfield directed a conveyance of the estate, subject to the payment of Amy's expenses; but on appeal to the House of Lords the decree below was reversed. The question appears to have been, not whether Amy's expenses, due from the assignor, were a lien upon the estate, but whether the grants made to Amy had not been accepted by him as a full compensation.

(*l*) See *Morison v. Morison*, 7 De G. M. & G. 226; *Re Exhall Coal Company*, 35 Beav. 449.

[*m*] *Stott v. Milne*, 25 Ch. D. 710.]

(*n*) *Smith v. Dresser*, 1 L. R. Eq. 651; 35 Beav. 378.

(*o*) *Woods v. Axton*, W. N. 1866, p. 207.

(*p*) *Leedham v. Chawner*, 4 K. & J. 458; in which case the Court held that there was no lien even as against a *cestui que trust* who knew and approved of the proceedings, but otherwise remained passive.

(*q*) *Darke v. Williamson*, 25 Beav. 622.

¹ See *Contra*. *Re Wilson*, 4 Barr. 430; *Hawley v. James*, 16 Wend. 61.

[13. Where a trustee has a right of indemnity out of the trust estate, he may at any time come to the Court to enforce it, and is under no obligation to wait until the trust estate has been turned into money under the trust (r).] [Enforcing right to indemnity.]

14. If trustees have to raise a certain sum which is properly chargeable on the corpus, and a *cestui que trust*, at the request of the trustees, advances money for the purpose, the *cestui que trust* stands * in the [* 641] place of the trustees and has a lien on the corpus for the amount (s). Advance by *cestui que trust*.

15. Although the trustees themselves are creditors upon the trust fund for the amount of their expenses, the persons who are employed by them as solicitors, surveyors, &c., have no such lien. And the law is so settled, notwithstanding an express declaration by the settlor that the trustees shall *in the first place pay the expenses of the trust*, and though the trustees themselves be charged to be insolvent. In every deed is implied a direction to pay the costs and expenses, and *expressio eorum quæ tacite insunt nihil operatur*. It would be a mischievous principle to hold, that every person with whom the trustees had incurred a just and fair demand might sue the trustees and come for an account of the whole administration (t). Lien does not extend to the traders' agents.

16. But a *solicitor* in accounting for his receipts to the trustees may set off his costs (u). And a positive direction to the trustees to employ a particular person as auditor or receiver, and allow him a proper salary, will constitute a trust in his favour, and, of course, give him a claim against the trust fund (v). But if a testator merely recommend or express a desire that his trustees should employ him as receiver, the question is, whether the words used amount to a trust, or only to an expression of opinion and advice: and to discover the meaning, the Court examines the provisions of the will, and if it finds that, to consider the words as a trust would be inconsistent with the general character of the will, which assumes that the administration of the estate is to be unfettered by such a trust, the Court comes to

[(r) *Re Pumfrey*, 22 Ch. D. 255, 262.]

(s) *Todd v. Moorehouse*, 19 L. R. Eq. 69 *Re Layton's Policy*, W. N. 1873, p. 49; and see *Clack v. Holland*, 19 Beav. 262.

(t) *Worrall v. Harford*, 8 Ves. 4, see 8; *Hall v. Laver*, 1 Hare, 571; *Feoffees of Heriot's Hospital v. Ross*, 12 Cl. & Fin. 507; *Francis v. Francis*, 5 De G. M. & G. 108.

(u) *Re Sadd*, 34 Beav. 650.

(v) *Williams v. Corbet*, 8 Sim. 349; *Hibbert v. Hibbert*, 3 Mer. 681; *Consett v. Bell*, 1 Y. & C. C. 569.

the conclusion that the words were meant only by way of suggestion (*w*). [And where a will contained a direction that "the testator's solicitor should be the solicitor to his estate and to his trustees in the management and carrying out the provisions of his will," it was held that no trust or duty was imposed on the trustees to continue the testator's solicitor as their solicitor (*x*).]

Trustee's
agents not
accountable
to the *cestui*
que trust.

17. *Vice versa*, the agent of a trustee is accountable to the employer only, the trustee, and not to the *cestui* [* 642] *que trust* (*y*); and * an action by *cestui que trust* against the trustee and *his solicitor*, alleging improper payments out of the trust fund by the trustee to the solicitor, [cannot be maintained as against] *the solicitor* (*z*). But under the special provisions of the Solicitors' Act (*a*), *cestuis que trust* may, at the discretion of the Court, obtain an order to tax the bill of the solicitor employed by the trustee (*b*), and generally *cestuis que trust* may proceed against an agent where he has not confided himself to the duties of an agent, but by accepting a delegation of the whole trust (*c*), or by fraudulently mixing himself up with a breach of trust (*d*), has himself become a trustee by construction of law.

Monies in
hands of
Secretaries of
State.

18. Monies voted by Act of Parliament for the *public service*, are not trust funds in the hands of the *Secretaries of State* for any particular individual, but for the general purposes of the office. The persons employed

(*w*) *Shaw v. Lawless*, 1 Ll. & G. t. Sugd. 154; reversed 1 Dr. & Walsh, 512; 5 Cl. & Fin. 129; Ll. & G. t. Plunk. 559; *Finden v. Stephens*, 2 Ph. 142; *Knott v. Cottee*, 2 Ph. 192.

[(*x*) *Foster v. Elsley*, 19 Ch. D. 518.]

(*y*) *Myler v. Fitzpatrick*, 6 Mad. 360, *per* Sir J. Leach; *Attorney-General v. Earl of Chesterfield*, 18 Beav. 596; and see *Langford v. Mahony*, 2 Conn. & Laws. 317; *Lockwood v. Abdy*, 14 Sim. 441; *Keane v. Roberts*, 4 Mad. 350; *Archer v. Lavender*, 9 I. R. Eq. 225, *per Cur.*

(*z*) *Maw v. Pearson*, 28 Beav. 196; [*Re Spencer*, 51 L. J. N. S. Ch. 271.]

(*a*) 6 & 7 Vict. c. 73, s. 39.

[(*b*) *Re Spencer*, *ubi supra*.] As to the circumstances under which the Court will direct taxation at the instance of a *cestui que trust*, see *Re Drake*, 22 Beav. 438; *Re Dickson*, 3 Jur. N. S. 29, and cases there referred to; and *Re Dawson*, 28 Beav. 605.

(*c*) *Myler v. Fitzpatrick*, 6 Mad. 360; and see *Pollard v. Downes*, 1 Eq. Ca. Ab. 6; *Lee v. Sankey*, 15 L. R. Eq. 204.

(*d*) See *Fyler v. Fyler*, 3 Beav. 550; *Alleyne v. Darcy*, 4 Ir. Ch. Rep. 199; *Portlock v. Gardner*, 1 Hare, 606; *Ex parte Woodin*, 3 Mont. D. & De G. 399; *Attorney-General v. Corporation of Leicester*, 7 Beav. 176; *Pannell v. Hurley*, 2 Coll. 241; *Bodenham v. Hoskyns*, 2 De G. M. & G. 903; *Morgan v. Stephens*, 3 Giff. 226; *Hardy v. Caley*, 33 Beav. 365.

by them, therefore, have no lien which they can enforce in equity (e).

19. If a person be trustee of different estates for the same *cestuis que trust* under the same instrument, and he incurs expenses on account of one estate in respect of which he has no funds, it is presumed that he may apply to their discharge any money which has come to his hands from any other of the estates; but he would not be justified in mixing up claims under one instrument of trust with those under another (f). [But where different estates are held under the same instrument for different *cestuis que trust*, the trustee cannot reimburse himself from one estate losses incurred in a *bonâ fide* administration of the other estate (g).] Trusts of two estates.

20. If the trust estate fail, the trustee may then institute proceedings against the *cestui que trust* on whose behalf and at whose request he acted, to recover from him personally the amount of the * money expended (h); and the rule applies to the case of a *cestui que trust* under *coverture*, to the extent of any property settled to her *separate use*, and where her anticipation is not restrained (i); and, generally, trustees acting with the sanction of their *cestuis que trust*, and not exceeding their powers, may call upon their *cestuis que trust* personally to reimburse them any necessary outlay (k); and in a late case it was held that a trustee who, in that character, had incurred a legal liability, might call upon the *cestui que trust* in equity to give an *indemnity* against the liability before any actual loss had accrued (l). [In a more recent case, however, Fry, J., was of opinion that a person who has undertaken a position of responsibility for another which entitles him to an indemnity cannot sue before the damage has accrued, which gives rise to the right to indemnity, How expenses recoverable where no trust estate.
[Indemnity against liability.]

(e) *Grenville-Murray v. Earl of Clarendon*, 9 L. R. Eq. 11.

(f) *Price v. Loaden*, 21 Beav. 508.

(g) *Fraser v. Murdoch*, 6 App. Cas. 855; and cf. *Re Johnson*, 15 Ch. D. 548.]

(h) *Balsh v. Hyham*, 2 P. W. 453; *Ex parte Watts*, 3 De G. J. & S. 394; *Re Southampton Imperial Hotel Company*, 26 L. T. N. S. 384, 20 W. R. 435; *Jervis v. Wolferstan*, 18 L. R. Eq. 18; [and see *Fraser v. Murdoch*, 6 App. Cas. 855, 872.]

(i) *Butler v. Cumpston*, 7 L. R. Eq. 16.

(k) *Ex parte Chippendale*, 4 De G. M. & G. 19, see 54; *Re Exhall Coal Company*, W. N. 1867, p. 244; *Ex parte Challis*, 16 W. R. 451; 17 L. T. N. S. 637; *James v. May*, 6 L. R. H. L. 328; and see *Hemming v. Maddock*, 9 L. R. Eq. 175.

(l) *Phené v. Gillan*, 5 Hare, 1, see pp. 9, 13; and see *Re Southampton Imperial Hotel Company*, 26 L. T. N. S. 384; 20 W. R. 435.

and he refused relief to a plaintiff who was holding, as a trustee for the defendant, shares not fully paid up in a company in liquidation, but on which no call had been actually made (*m*). And where the trustee acts at the instance of the maker of the trust, at any rate where the maker of the trust is not also beneficially interested under the trust instrument, the trustee has no right to personal indemnity from the settlor, but must look exclusively to the trust funds to make good his expenses or losses (*n*).]

Claim of expenses against a *cestui que trust* personally.

21. But the trustee can establish no claim to reimbursement either against the *cestuis que trust* personally, or against the trust estate, where he has incurred the outlay not in the strict line of his duty, and without either the request or the implied assent of the *cestuis que trust* (*o*).

Funds out of which expenses payable.

22. Questions occasionally arise respecting the proper fund for payment of expenses. In one case (*p*), Sir John Leach decided that a provision made in a will for [* 644] payment of *debts and funeral and testamentary expenses* out of a particular fund, did not make that fund *primarily* liable for *costs of administration*. In a subsequent case, Lord Langdale arrived at a different conclusion (*q*); [and after considerable variation of judicial opinion, the later cases seem to have established the rule that the words *testamentary expenses* include the *costs of administration* (*r*). So] where the

[*(m)* Hughes-Hallett v. Indian Mammoth Gold Mines Company, 22 Ch. D. 561; but see Lord Ranelagh v. Hayes, 1 Vern. 189; Phené v. Gillan, *ubi supra*.]

[*(n)* Fraser v. Murdoch, 6 App. Cas. 855, 872.]

[*(o)* Leedham v. Chawner, 4 K. & J. 458. In Collinson v. Lister, 20 Beav. 368, where the advances were not proper, the M.R. said, "No assets exist out of which the executor could seek for payment, and of course, it could not be contended that the plaintiffs (who were the *cestuis que trust*) were liable to repay the advances."

[*(p)* Brown v. Groombridge, 4 Mad. 495.

[*(q)* Wilson v. Heaton, 11 Beav. 492.

[*(r)* Miles v. Harrison, 9 L. R. Ch. App. 316; Harloe v. Harloe, 20 L. R. Eq. 471; Sharp v. Lush, 10 Ch. D. 468; Penny v. Penny, 11 Ch. D. 440; Morrell v. Fisher, 4 De G. & Sm. 422, but see *contra*,] Stringer v. Harper, 26 Beav. 585; Linley v. Taylor, 1 Giff. 67; Webb v. De Beauvoisin, 31 Beav. 573; Gilbertson v. Gilbertson, 34 Beav. 354; Hill v. Challinor, W. N. 1867, p. 139; Lees v. Lees, 6 I. R. Eq. 259; M'Cormick v. Patten, 5 I. R. Eq. 295; *Re Biel's Estate*, 16 L. R. Eq. 577. [In Webb v. De Beauvoisin, where the trust was for "payment of debts, testamentary and other expenses and legacies under the will," and in Coventry v. Coventry, 2 Dr. & Sm. 470, where the trust was "to pay funeral and testamentary and legal expenses," it was held that the words included costs of administration.]

trust was for "payment of debts, funeral expenses, and the cost and charges of proving and attending the execution of the will, and the several trusts therein contained" (s), [and where the trust was "to pay debts and executorship expenses and probate duty" (t),] it was held the words included costs of administration.

23. Where a testator bequeathed "a leasehold house and all other his *personal property*" to his wife, and then devised his *real estate* to be sold, the proceeds to be applied in "payment of funeral and testamentary expenses and debts," and the "*residue*" to be invested, it was held that the funeral and testamentary expenses and debts were thrown upon the *real estate* in exoneration of the *personal estate*, but that the costs of the special case for taking the opinion of the Court were not "testamentary expenses," and therefore fell upon the *personalty* (u); [but having regard to the present rule, it is conceived that this case would not now be followed on the question of costs.] Exoneration of personalty.

24. A trust in a will of real and personal estate to pay out of the personal estate the expenses of probate and "the *execution of the trusts* of the will," does not authorize the trustee to apply the fund in payment of any other expenses than what would be payable by the *executors* in that character, and therefore does not authorize the application of the personal estate in payment of the expenses incurred in the execution of trusts declared of the testator's *real estate* (v). Trust to pay costs of trust.

(s) *Alsop v. Bell*, 24 Beav. 451, see p. 469.

[(t) *Sharp v. Lush*, 10 Ch. D. 468.]

(u) *Gilbertson v. Gilbertson*, 34 Beav. 354.

(v) *Lord Brougham v. Lord Poulett*, 19 Beav. 119; and see *Sanders v. Miller*, 25 Beav. 154.

HOW A TRUSTEE MAY OBTAIN HIS DISCHARGE FROM THE OFFICE.

WE shall conclude the subject of the *Office* of Trustee by considering in what manner he may divest himself of that character.

How the trust may be relinquished.

The only modes by which he can accomplish this object are the following: *First*, He may have the universal consent of all the parties interested; *Secondly*, He may retire by virtue of a special power contained in the instrument creating the trust, [or a statutory power applicable to the trust;] or, *Thirdly*, He may obtain his release by application to the Court.

First. By consent.

Trustee may retire with consent of *cestui que trust*.

1. As no *cestui que trust* who concurs in a breach of trust by the trustee can afterwards call him to account for the mischievous consequences of the act, it follows, that where *all* the *cestuis que trust*, being *sui juris*, lend their joint sanction to the trustee's dismissal, they are precluded from ever holding him responsible on the ground of delegation of his office (*w*).

All must concur.

2. But the trustee must first satisfy himself that *all* the *cestuis que trust* are parties, for even in the case of a numerous body of creditors the consent of the majority is no estoppel as against the rest (*x*).

Cestuis que trust not *sui juris*.

3. And the *cestuis que trust* who join must be *sui juris*, not *femes covert* or infants, who have no legal capacity to consent.¹ But a *feme covert* is considered to be *sui juris* as to her separate estate where there is no restraint against anticipation (*y*); and as to *real estate* she can, with the consent of her husband, bind her interest by an assurance under the Fines and Recoveries Act.

Not in existence.

4. If the parties interested in the trust fund be not all in existence, as where the limitation of the property is to children unborn, it is clear, that as the trustee

(*w*) *Wilkinson v. Parry*, 4 Russ. 276, *per* Sir J. Leach.

(*x*) See *supra*, p. 498, note (*e*).

(*y*) See *infra*, chap. xxvii. s. 6.

¹ *Creeger v. Halliday*, 11 Paige, 314.

cannot have the sanction of *all the parties [* 646] interested, he cannot with safety be discharged from the trust.

Secondly. A trustee may retire by virtue of a special power contained in the original instrument, [or a statutory power applicable to the trust.]

1 The person who creates the trust may mould it in whatever form he pleases, and may therefore provide, that on the occurrence of certain events and the fulfilment of certain conditions, the original trustee may retire, and a new trustee be substituted.¹ Trustee may retire under a power.

2. The form of power (z) most commonly in use is, that in case the trustees appointed by the instrument of trust, or to be appointed under the power, or any of them, shall "die or be abroad for twelve calendar months, or be *desirous of being discharged from*, or refuse, decline, or become incapable (a) to act in the trusts," it shall be lawful for the *cestui que trust* to whom the power may be given, or (as the proviso is frequently worded) for the surviving or continuing trustee (b), or the executors (c) or administrators of Usual form of the power.

(z) The best modern forms did contain the additional words, "or by the Court of Chancery or other competent authority," in order to obviate the break in the chain of trusteeship which would otherwise have been occasioned by a resort to the Court, but the addition is now unnecessary [for that purpose; see 44 & 45 Vict. c. 41, s. 33; but see *Cecil v. Langdon*, 28 Ch. D. 1. where the Court was of opinion that where the power authorized the appointment of new trustees in the place of those originally appointed or to be appointed under the power, an appointment could not be made under the power in the place of a trustee who had been appointed by the Court.]

(a) "Unfit" may be usefully added; see p. 658 *infra*.

(b) The best forms provide that a refusing or retiring trustee shall, *if willing to execute the power*, be deemed to be a continuing trustee. As to the object of this addition, see p. 664 *infra*. But it is attended with this inconvenience, that if the refusing or retiring trustee do not join, evidence may be called for that he was *not willing*. Sometimes the power is given to the surviving, continuing, or other trustee, an addition which has been found useful in practice. See *Lord Camoys v. Best*, 19 Beav. 414.

(c) Better to say "acting executors or executor or administra-

¹ Every instrument where there is a continuing trust of an active character, *should*, of course, until the modern Acts, have contained a power of appointment of new trustees, but, singularly enough, Lord Thurlow omitted to insert one in his own will, of which Lord Eldon and two others were named trustees. The defect was supplied by a private Act of Parliament, 15th June, 1809 (49 G. 3, cap. clxxv.), by which power was given to the Court of Chancery, in case any of the three trustees "should die, or be desirous of being discharged from, or should refuse, or decline, or become incapable to act in the trusts," to appoint a new trustee in a summary way upon petition.

the survivor, by deed or writing, to nominate some [* 647] other person to be a trustee; * and the power then proceeds to declare that the trust estate shall forthwith be vested jointly in the persons who are in future to compose the body of trustees; and that the new or substituted trustee shall, either before or after the trust estate shall have been so vested, be capable of exercising all the same powers as if he had been originally named in the settlement.

Several sets
of trustees.

3. It often happens that in a settlement there are several sets of trustees—a term of 99 years for instance is vested in A. and B., and a term of 500 years in C. and D., and there is a limitation to E. and F. for the life of a person, with powers of sale and exchange, &c., and then a power of appointment of new trustees is given to “the surviving or continuing trustees or trustee.” If A. die who can appoint in his place? Is the power in B. as the survivor in that particular trust, or in B., C., D., E. and F. jointly as the survivors of the trustees *en masse*? This doubt has occasionally in practice led to expense, which might easily have been avoided by a few words in the power declaratory of the intention, as by limiting the power to “the surviving or continuing trustees or trustee of the class in which any such vacancy or disqualification shall occur.”

Lord Cran-
worth's Act.

4. Lord Cranworth's Act, provided against the omission of a power of appointment of new trustees in any instrument of trust, and also against defects in the power, by enacting generally, by the 27th section, that “whenever any trustee, either original or substituted, and whether appointed by the Court of Chancery or otherwise, should die or desire to be discharged from, or refuse or become unfit or incapable to act,” it should be lawful for the person nominated for that purpose by the instrument creating the trust, or if there should be no such person, or he should be unable or unwilling to act, then “for the surviving or continuing trustees or trustee for the time being, or the acting executor or administrator of the last surviving and continuing trustee, or for the last retiring trustee, by writing, to appoint any other person or persons to be a trustee or trustees,” and the Act gave the usual directions for vesting

tors or administrator,” as otherwise if several executors be appointed, and one only proves, it may be objected (though the objection may be untenable) that the other executors must actually renounce before the acting executor can exercise the power, see *White v. M'Dermott*, 7 I. R. C. L. 1; *Worthington v. Evans*, 1 S. & S. 165; *Clarke v. Parker*, 19 Ves. 1; see *post*, p. 656, note (e).

the trust estate (*d*); and the following section made the Act apply to the case of a trustee dying in the testator's lifetime. But it will be observed that the Act did not provide for the case of a trustee *going abroad*, and it cannot be safely assumed, until a decision, that the word "*refuse*" was meant to include a *disclaimer* (for a disclaiming trustee never was a trustee (*e*);) and its operation was, by the 34th * section of the [* 648] Act, restricted to instruments *inter vivos* executed after the passing of the Act (28th August, 1860), and to wills and codicils made, confirmed, or revived after that date.

It has been held that the donee of the power under this Act could appoint two trustees in the place of an only trustee appointed by the settlor's will (*f*). Two trustees in place of one.

[5. The above provisions of Lord Cranworth's Act [44 & 45 Vict. c. 41, s. 31.] have, however, been repealed by the Conveyancing and Law of Property Act, 1881 (*g*), and their place supplied by sect. 31, which enacts, that "where a trustee, either original or substituted, and whether appointed by a Court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from the trusts or powers reposed in or conferred on him, or refuses, or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for that purpose by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may, by writing, appoint another person or other persons to be a trustee or trustees." And the Act authorizes an increase or reduction in the number of trustees, so that "except where only one trustee was originally appointed a trustee shall not be discharged under the section from his trust, unless there will be at least two trustees to perform the trust;" and provides for the vesting of the trust property; and makes the provisions of the section

(*d*) 23 & 24 Vict. c. 145, s. 27.

(*e*) In *Viscountess D'Adhemar v. Bertrand*, 35 Beav. 19, it was assumed that a disclaiming trustee was within the Act, and it was held that an appointment of a new trustee by the continuing trustee under the Act did not take away the general jurisdiction of the Court to appoint in proper cases an additional trustee; and see *Re Jackson's Trusts*, 16 W. R. 572; 18 L. T. N. S. 80; and *post*, p. 656.

(*f*) *Re Breary*, W. N. 1873, p. 48.

[(*g*) 44 & 45 Vict. c. 41.]

relative to a trustee who is dead include the case of a person nominated trustee of a will but dying in the testator's lifetime, and those relative to a continuing trustee include a refusing or retiring trustee; and the section applies to trusts created either before or after the commencement of the Act.

The section applies only so far as a contrary intention is not expressed in the instrument, if any, creating the trust; but where a power of appointing new trustees had been given by a settlement, made in 1849, to "the surviving or continuing trustees or trustee," which they or he were required to exercise with the consent of the tenant or tenants for life or in tail for the time being entitled in possession, it was held that the fetter imposed by the settlement did not apply to an appointment [* 649] ment under the powers of the Act, and * that the continuing trustee could appoint new trustees under the Act; the power in the settlement having in the events which had happened ceased to be exercisable (*h*). It would seem that an appointment under this section may be made by the personal representative of a sole trustee; *Re Shafto's Trusts*, 29 Ch. D. 247.

6. The representatives of a deceased trustee do not by declining to exercise the statutory power of appointment, render themselves liable to the costs of an application to the court to appoint new trustees (*i*).

7. A settlement made in 1878 contained a declaration that the husband and wife during their joint lives should have power to appoint new trustees of the settlement. After the Conveyancing and Law of Property Act, 1881, came into operation, the husband and wife executed a deed appointing a new trustee in the place of one of the trustees who had *remained out of the United Kingdom for more than twelve months*, and it was held that the appointment was valid under sect. 31 of the Act; and North, J., observed, "the intention of sect. 31 is that, whenever a person has been nominated by the instrument creating the power as the person to appoint new trustees, he has the power of filling up any vacancy occurring under the provisions of the section (*k*)."

It will be observed, however, that the husband and wife were in this case nominated to fill up vacancies in the trusteeship generally, and not only in certain specified events, and the observations of the learned judge must be read by the light of the existing circumstances,

[*(h)* Cecil v. Langdon, 28 Ch. D. 1.]

[*(i)* *Re Sarah Knight's Will*, 26 Ch. D. 82.]

[*(k)* *Re Walker and Hughes' Contract*, 24 Ch. D. 698.]

and the case is no authority that where the settlement has given the power of appointing new trustees in certain special events to A., he is by the Act empowered to appoint new trustees in any other event not mentioned in the settlement, but falling within sect. 31. The proper construction of the Act would seem to be that in such a case the power of appointing new trustees is in the surviving or continuing trustees or trustee, or the personal representatives of the last surviving or continuing trustee.]

8. The words contained in the ordinary form which expressly confer all powers on the new trustee before the estate has been conveyed, show that a doubt has been felt by the profession, whether in absence of these words the powers could be exercised until after conveyance, and the late Vice Chancellor of England, in a case where the words referred to did not occur, but there was simply a power of nomination and no direction for a conveyance, expressed his opinion to be that the person to be appointed was not invested with the character of trustee until he had both been nominated to *the [* 650] office by the donee of the power, and the *trust property* had also been duly conveyed or assigned (l). But in a more recent case before Sir John Romilly, M.R. (m), where A. and B. were appointed trustees of a settlement, and after a lapse of 18 years A. disclaimed, and B. was desirous of retiring, and the donee of the power nominated C. in the place of A., and D. in the place of B., and B. professed to assign the trust fund (consisting of a share of 3,000*l.* in the hands of trustees of another settlement) to C. and D., who filed their bill without their *cestuis que trust* to have the trust fund paid to them, it was objected against the validity of the appointment that A. had acted, and that consequently B. could not alone pass the trust fund, and that therefore the appointment of trustees was incomplete; but the Master of the Rolls held that, whether A. had acted or not, his disclaimer was a wish to retire, and that C. and D. were duly appointed, and were entitled to call for payment of the trust fund: that the *appointment* of new trustees, and the *conveyance* of the trust property to them were *two distinct and separate matters*, and that the transfer could only take place when the appointment was complete; and that various difficulties would arise from holding that the transfer of the trust fund was necessary to perfect the appointment. And

Whether a new trustee is actually such until transfer of the estate to him.

Noble v. Meymott.

(l) Warburton v. Sandys, 14 Sim. 622.

(m) Noble v. Meymott, 14 Beav. 471.

in a subsequent case before the same judge, where there was the usual power of appointment of new trustees, with a direction for the conveyance of the trust estate, and the donee of the power appointed a new trustee in the place of a deceased trustee, but the trust estate was not conveyed, and the surviving trustee and new trustee then sold the estate and signed a receipt for the purchase-money, it was held that the purchaser acquired a good title (n). It would appear, therefore, that at the present day an actual conveyance of the legal estate, unless the power be specially worded, is not essential to the valid appointment of new trustees.

Mode of vest-
ing trust
estate.

9. Should the trust estate consist of Bank Annuities, or other property transferable in the books of any company, then by one and the same deed the donee of the power may nominate the new trustee, and the old and new trustee may execute a declaration of trust of the stock or other property intended to be transferred, and after the execution of the deed the stock may be transferred into their joint names accordingly. If the trust estate consist of *chattels real, or other personal estate legally assignable*, two deeds, until a modern Act, were necessary. By the first, the old trustee assigned [* 651] *the chattel interest to A., and then A. by indorsement re-assigned it to the old and new trustees as joint tenants. But now, by Lord St. Leonards' Act, 22 & 23 Vict. c. 35, s. 21, a person may assign chattels real and other personal property *assignable at law* to himself and another, so that in such cases for the future one deed will be sufficient¹; [and the power has by the Conveyancing and Law of Property Act, 1881 (o), been extended to things in action.] If the trust estate be of a *freehold* nature, and by the terms of the instrument of trust the whole legal estate is to be vested in the trustees, there needs, in general, no other machinery than a simple conveyance under the Statute of Uses; for the old trustee may convey the lands to the

(n) Welstead v. Colville, 28 Beav. 537.

[(o) 44 & 45 Vict. c. 41 s. 50.]

¹ The Act does not authorize an assignment by a person to himself (as by an executor to himself as legatee), nor by himself and another or others to himself, as by two co-executors to one of them as trustee, for in the first case he has the legal estate already and a declaration will shift the equitable interest, and in the second case so far as he has not the legal estate in himself the other or others can assign it or release it independently of the Act. The operation of the Act is limited to property *assignable at law*, for mere equitable interests shift according to the intention, and no legislative interference was required as to them.

joint use of himself and the new trustee, and the statute will operate to transfer the possession. But in *settlements which invest the trustees with powers*, the established form of the proviso has been thought to occasion the necessity of resorting to the use of two deeds. The language of the clause is, that "the *trust estate* shall be conveyed in such manner that the same may be vested in the old and new trustees to the uses, trusts, intents, and purposes of the settlement." Now the meaning obviously is, that, as by the settlement an estate to preserve contingent remainders, or, it may be, some other interest, was limited to the trustees who are armed with the powers, should either of the trustees die, &c., and a new trustee be appointed, such estate *pur autre vie*, or other interest, should be transferred to the old and new trustees jointly. But the practitioner *ex majori cautela*, attached to the words, the possible, however improbable construction, that on the appointment of a new trustee the whole settlement should be re-opened, and that the fee-simple should *ab entrego* be conveyed to the old and new trustees to all the same uses, &c., as were declared by the original deed. For accomplishing this object it was necessary that two instruments should be prepared. By the first, the new trustee was nominated by the donee of the power, the old uses of the settlement were absolutely revoked (the proviso, it was said, implying an *authority for that purpose), and the use was appointed to A. and his heirs, and the estate and interest vested in the old trustees was assured unto and to the use of A. and his heirs, by way of conveyance. When this had been effected by one deed, and A. had become seised, or was supposed, to have become seised, of the inheritance in fee-simple he then, by conveyance, which was indorsed on the former deed, reconveyed the premises to the old and new trustees to the uses, trusts, &c. of the settlement, in the same manner as if the new trustee had been originally appointed. Thus, if the real intention was, that, on the appointment of a new trustee a seisin to serve the uses should be vested in the old and new trustees jointly, then a power of revocation was implied, and the direction was complied with. If the settlor had no such intention, then there was no implied power of revocation, and the affected exercise of it was a nullity, and the conveyance *by* the old trustee, and the reconveyance *to* the old and new trustees served only to pass the actual and vested interest. These notions are now treated as old fashioned, and the preva-

lent and better opinion is, that a simple conveyance from the old trustee to the use of the old and new trustees will be sufficient (p).

[New method of vesting the trust property in new or continuing trustees.]

[10. By the Conveyancing and Law of Property Act, 1881, sect. 34, a new and simple method of transferring trust property without conveyance or assignment has been introduced, which is now generally adopted where applicable. That section provides that, where a deed by which a new trustee is appointed to perform any trust contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover and receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become and are the trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in those persons, as joint tenants, and for the purposes of the trust, that estate, interest, or right.

But the section does not extend to any legal estate or interest in copyhold or customary land, or to land conveyed by way of mortgage for securing money subject to the trust, or to any such share, stock, annuity, or property as is only transferable in books kept by a company or other body, or in manner prescribed by or under Act of Parliament.

It is to be observed that the declaration of vesting [* 653] can only be * made by the *deed by which a new trustee is appointed*, and the section will not apply in cases where the appointment is made otherwise than by deed. The expression "the persons who by virtue of the deed become and are the trustees for performing the trust," is not happily worded, but the intention of the legislature doubtless was to vest the trust property in the persons who immediately upon the execution of the deed of appointment are the trustees for performing the trust, and it is conceived that this intention is sufficiently expressed.]

Stamps on appointment of new trustees.

11. By 33 & 34 Vict. c. 97, the appointment of a new trustee requires a 10s. *stamp*, and by s. 78 "every instrument and every *decree or order* of any Court, or of any commissioners, whereby any property on any occasion, except a sale or mortgage, is *transferred* to or *vested* in any person is chargeable with duty as a conveyance or transfer of property. Provided that a conveyance or transfer made for effectuating the appoint-

(p) See Sugd. Powers, 884, note (1), 8th ed.; Davidson's Preced. vol. 3, p. 521, and vol. 4, 609, 2nd ed.

ment of a new trustee, is not to be charged with any higher duty than 10s." [But by sect. 8 "An instrument containing or relating to several distinct matters is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each matter"; and accordingly where by an order of the Charity Commissioners new trustees were appointed of a charity, and a vesting order was also made, it was held that two duties of 10s. each were payable, one in respect of the appointment, and the other in respect of that part of the order which vested the trust estate in the new trustees (q). And on the same principle it would seem that a double duty is payable in the ordinary case of an appointment of new trustees by deed with a consequent transfer of the estate.

12. Prior to the Conveyancing and Law of Property Act, 1881, a trustee could not retire from the trust without seeing that a new trustee was appointed in his place, unless the settlement contained a special power authorizing him to do so, a circumstance which seldom occurred; but by sect. 32 of that Act it is enacted that—

[Trustee retiring under recent Act without appointing a new trustee.]

(1) Where there are more than two trustees, if one of them by deed declares that he is desirous of being discharged from the trust, and if his co-trustees, and such other person, if any, as is empowered to appoint trustees, by deed consent to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property, then the trustee desirous of being discharged shall be deemed to have retired from the trust, and shall, by the deed, * be discharged [* 654] therefrom under this Act, without any new trustee being appointed in his place.

(2) Any assurance or thing requisite for vesting the trust property in the continuing trustees alone shall be executed or done.

The section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust; but it applies to trusts created either before or after the commencement of the Act.

By sect. 34, Where a deed by which a retiring trustee is discharged contains a declaration by the retiring and continuing trustees, and by the other person, if any, empowered to appoint trustees, to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover and

[(q) *Hadgett v. The Commissioners of Inland Revenue*, 3 Ex. D. 46.]

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receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become and are the trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in the continuing trustees alone, as joint tenants, and for the purposes of the trust, the estate, interest, or right to which the declaration relates. But the section does not extend to any legal estate or interest in copyhold or customary land, or to land conveyed by way of mortgage for securing money subject to the trust, or to any such share, stock, annuity, or property as is only transferable in books kept by a company or other body, or in manner prescribed by or under Act of Parliament.]

Trustee must see that the power contemplated the precise case.

13. It must be carefully ascertained by the trustee that the circumstances under which he retires from the trust are precisely those which are contemplated in the terms of the proviso; for if the case be not warranted by the power, the trustee who resigns will be made responsible for all the mischievous consequences, just as if he had delegated the office.

Retiring trustee must see to completion of the appointment.

14. An a trustee on retiring must [if a new trustee is to be substituted in his place] be careful not to part with the control of the fund before the new trustee has been actually appointed, for if he transfer it into the name of the intended new trustee and by some accident the appointment fails to be completed, he still remains a trustee, and will be answerable for the trust fund (r).

If the old trustee obstinately and perversely, without any sufficient reason, *refuse* to transfer the fund to new [* 655] trustees duly * appointed he will be visited with the costs occasioned by his wilfulness (s).

15. It is somewhat surprising, considering the frequency of this power, how few questions until lately arose upon its construction.

Sharp v. Sharp.

In *Sharp v. Sharp* (t), heard in the Court of Queen's Bench, the terms in which the power was expressed were as follows ;—“In case *either* of the trustees, the said A. and B., shall happen to die, or desire to be discharged from or neglect, or refuse, or become incapable to act in the trusts, it shall be lawful for the *survivors or survivor* of the trustees *so acting* in the trusts, or the executors or administrators of the last surviving trustee, by any writing, &c., to nominate a new trustee.” Neither

- (r) *Pearce v. Pearce*, 22 Beav. 248.
- (s) *Re Wise's Trust*, 3 L. R. Eq., 599.
- (t) 2 B. & Ald. 405.

of the trustees being willing to act in the trust, they executed a *conveyance* to two other persons intended to be new trustees ; and the question was raised, whether the power of appointment had, under the circumstances been effectually exercised, and it was determined in the negative. Lord Tenterden said that by the word "survivor" he understood merely the trustee "continuing to act" ; for it was throughout the intention of the testator, that, in case of the death, or incapacity, or refusal of some *one* of the trustees, the *remaining trustee* who had been named by him and was the object of his confidence, should have the power of associating with himself some other person : but it would be giving a much larger construction to the words than they fairly imported, if the trustees, in the event of the whole class declining to act, were to nominate such other persons as they might think fit. Mr. Justice Bayley observed, that the word "either" was not uselessly introduced : that it was in effect a proviso that if *either* of the trustees named in the will should refuse to act, still that the testator should have the benefit of the judgment of the other : that the testator might have had good reason for confining the power to the care of the trustee, for he might have had special confidence in the trustees named by himself, and so long as *either* of those persons acted in the trust he might think his property safe. But if the words were to be read as if they were "*both or either*," the case would be different ; for if both the persons should decline to act, the testator might naturally object to their delegating their trust to other persons, and might then have thought it better that his property should be left to the care of a Court of equity : that under the words of the power the testator meant by the word "*acting*" to designate those who had taken upon themselves to perform some of * the trusts mention- [* 656] ed in the will, and that he did not contemplate one who *in limine refused to act* : that the word "*survivor*" must therefore mean the "*continuing*" trustee, as contradistinguished both from those who might refuse to act, and those who might be desirous to discontinue acting.¹

16. If *one trustee disclaims*, may the continuing trustee appoint another, or do the words of the power, "if declining" any trustee shall *refuse or decline*" apply not to the case of a *disclaimer*, but only to a *refusal after*

"Refusing or declining," includes "disclaiming."

¹ See *Guion v. Pickett*, 42 Miss. 77.

having acted? Although the point decided in *Sharp v. Sharp* was as stated above, yet from the language of the judges it appears that, had only one trustee disclaimed, the other might have exercised the power; and such, it is presumed, is clearly the rule where there is nothing to narrow the meaning of the words "refusing or declining." There generally follows in the power a direction that the estate "vested in the trustee so refusing or declining" shall be transferred to the new trustee; and hence it has been argued, that as no estate vests in a disclaiming trustee, the power did not contemplate such a case. However, there seems to be but little weight in the argument; for when it is said that the words "if any trustee shall refuse or decline" apply to disclaimer, it is not meant that they do not also apply to a subsequent refusal. At all events, therefore, the direction for the transfer of the estate is not nugatory (*u*).

"Refusing" or "declining" means also after having acted.

17. On the other hand, it has been doubted whether the words "refusing" or "declining" may not refer exclusively to disclaimer, and have no application to the case of a trustee who, *after having accepted the trust, refuses to act any longer in it*. This proposition is also thought to be untenable (*v*), though some recent cases have an opposite tendency (*w*).

Payment into Court is "declining."

18. It has been held that a *payment of the trust money into Court*, under the Trustee Relief Act, stamps the trustee with the character of a "*refusing or declining trustee*" (*x*).

Power to executors and administrators.

19. If a power of appointing new trustees be given to a person, his executors and administrators, and the donee of the power dies, having appointed three executors, one of whom renounces, the *acting* executors can exercise the power (*y*).

[*657] * [20. In a case in Ireland, where the power of

(*u*) *Re Roche*, 1 Conn. & Laws. 306; *Walsh v. Gladstone*, 14 Sim. 2; *Mitchell v. Nixon*, 1 Ir. Eq. Rep. 155; *Crook v. Ingoldsby*, 2 Ir. Eq. Rep. 375; *Viscountess D'Adhemar v. Bertrand*, 35 Beav. 19.

(*v*) *Travis v. Illingworth*, 2 Dr. & Sm. 344.

(*w*) See *Re Woodgate's Settlement*, and *Re Armstrong's Settlement*, 5 W. R. 448.

(*x*) *Re William's Settlement*, 4 K. & J. 87.

(*y*) *Earl Granville v. McNeile*, 7 Hare, 156. The Reporter speaks of the third executor as "declining," but renunciation is meant, as assumed by the judgment, and expressly stated; 13 Jur. 252. It would seem, from the principle laid down by the Court, that, had the third executor declined only to act as executor without actual renunciation, the judge would have arrived at the same conclusion: and see *ante*, p. 202.

appointing new trustees was given to the acting executors or administrators of the last surviving trustee, and the last surviving trustee was dead, but there was no legal personal representative of his estate, and the persons entitled to take out letters would not do so, the Court of Probate granted administration to the guardian of the infant *cestuis que trust*, limited to the purpose of appointing himself and A. B. new trustees of the settlement, and to the purpose of transferring to, and vesting in, such new trustees the trust funds (z).]

[Limited administration for purpose of appointing new trustees.]

21. Suppose a testator to appoint two trustees with the *usual power of appointment* of new trustees, and a trustee *dies in the testator's lifetime*, can the surviving trustee appoint a new trustee? The late Vice Chancellor of England in one case expressed a doubt upon it (a), and in a subsequent case decided in the negative (b); but this was a narrow construction of the power, and it has since been ruled that a trustee who has survived the testator may appoint a new trustee in the place of one who predeceased the testator (c).

Death of the trustee in the testator's lifetime.

22. In *Morris v. Preston* (d), the proviso was, that "in case of the death of any or either of the two trustees during the lives of the husband and wife or the life of the survivor, the husband and wife or the survivor should, *with the consent of the surviving co-trustee or co-trustees*, nominate and appoint a new trustee or trustees, and that upon such nomination or appointment the *surviving co-trustee* should convey and assign the trust estates in such manner as that the *surviving trustee and trustees*, and such person or persons so to be nominated and appointed, should be jointly interested in the said trusts in the same manner as such *surviving trustee* and the person so dying would have been in case he were living." Both the trustees died, and the wife, who survived her husband, executed an appointment of two new trustees in the place of the deceased trustees. A purchaser took the objection, that as the proviso clearly contemplated the case of *one trustee* * sur- [* 658]

Morris v. Preston.

[(z) *Re Jackson*, 7 L. R. Ir. 318.

(a) *Walsh v. Gladstone*, 14 Sim. 2.

(b) *Winter v. Rudge*, 15 Sim. 596.

(c) *Re Hadley*, 5 De G. & Sm. 67; *Nicholson v. Wright*, 26 L. J. N. S. Ch. 312, S. C. *nomine Nicholson v. Smith*, 3 Jur. N. S. 313; *Noble v. Meymott*, 14 Beav. 477. As regards the statutory power conferred by 23 & 24 Vict. c. 145, s. 27, the doubt was guarded against by express enactment; see sect. 28; [as is also the case as regards the statutory power conferred by 44 & 45 Vict. c. 41, s. 31.]

(d) 7 Ves. 547.

viving, an appointment of new trustees after the decease of *both* the original trustees was not warranted by the power. The purchaser abandoned the objection at the hearing without argument—a circumstance much to be regretted, as a judgment from Lord Eldon would have thrown great light upon the subject. However, the case as it stands has been said by the Lord Chancellor of Ireland to be of great authority—viz. in favour of the validity of the appointment (e).

Power to
tenant for
life with the
surviving or
continuing
trustee.

23. In another case, where two trustees had been appointed by the settlement, and the power was, “that if either of the trustees should die, or reside beyond seas, or become incapable or *unfit to act* in the trusts, it should be lawful for the tenants for life, *together with the surviving or continuing or acting trustee for the time being*, to nominate a new trustee, and that *the trust estate should thereupon be vested in the newly appointed trustee, jointly with the surviving or continuing trustee*,” upon the trusts of the settlement; and one trustee died and the other became bankrupt; on the suggestion by counsel that there was *no surviving or continuing trustee*, and therefore the power was gone, the Lord Chancellor of Ireland observed, “That happens in many cases without the power being affected. The construction is not so straitlaced as all that” (f).

Bankrupt
trustee is
“unfit.”

24. It was ruled in the same case, that a trustee who became *bankrupt* was “unfit” within the words of the power. But if the power be worded “in case the trustee shall become *incapable to act*,” without the addition of the words “or unfit,” a bankrupt trustee is not within the description, for by “incapable” is meant *personal incapacity* and not pecuniary embarrassment (g). And a *bankrupt*, who has obtained a first-class *certificate*, [and has since the bankruptcy made a fresh start in life and has ceased to be impecunious,] cannot be regarded as unfit to be a trustee (h). [But the mere fact that the bankruptcy arose from misfortune, and not from any fault on the part of the bankrupt, does not remove his unfitness unless it can also be shown that since his bankruptcy he has become a person of means (i).]

Trustee
resident
abroad.

25. The Court held in one case that a trustee who went to reside permanently *abroad*, came within the de-

(e) *Re Roche*, 1 Conn. & Laws. 308.

(f) *Re Roche*, 1 Conn. & Laws. 306; 2 Dru. & War. 287.

(g) *Re Watt's Settlement*, 9 Hare, 106; *Turner v. Maule*, 15 Jur. 761; *Re East*, 8 L. R. Ch. App. 735.

(h) *Re Bridgman*, 1 Dr. & Sm. 164.

(i) *Re Adams' Trust*, 12 Ch. D. 634; and see *Re Barker's Trust*, 1 Ch. D. 43; *Re Hopkins*, 19 Ch. D. 61.]

scription of a trustee "*incapable to act*" (*k*), but this seems scarcely in harmony with * correct principle (residence abroad being rather a question of unfitness than incapacity), and cannot be reconciled with other authorities (*l*). And the Court has since intimated an opinion that incapacity means *personal* incapacity (*m*).

26. If the power provide that if any one of the three "Unable" to trustees become "unable" to act, "the trustees or trustee for the time being, whether continuing or declining to act," may appoint a new trustee, the two trustees who remain capable can appoint a new trustee in the place of a lunatic trustee (*n*).

27. If the settlement provide that a trustee shall cease to be such "on departing the United Kingdom from whatever cause or motive or under whatever circumstances," the clause nevertheless does not apply to a mere *temporary absence* with the intention of returning (*o*).

28. If there be *two trustees* of a settlement, and both be anxious to retire from the trust at one and the same time, they would not be justified in putting the property under the control of a *single trustee* appointed in their *joint places* (*p*)¹.

29. And *vice versa*, [until the recent Act, a *single trustee* had he wished to retire, could not have appointed] *more than a single trustee* in his place; for though, in the substitution of more trustees than one, he would be chargeable rather with too much than too little caution, yet he ought not to clog the estate with unnecessary machinery. The idea of the settlor may have been, that by increasing the number of the trustees the vigilance of each, individually, would be diminished. "A great number," observed Lord Mansfield, "may not do business better than a smaller, and it would be attended with more expense" (*q*). [But now

(*k*) *Mennard v. Welford*, 1 Sm. & G. 426; S. C. 1 Eq. Rep. 237; and see *Re Bignold's Settlement Trusts*, 7 L. R. Ch. App. 223.

(*l*) *Withington v. Withington*, 16 Sim. 104; *Re Harrison's Trust's*, 22 L. J. N. S. Ch. 69; and see *Re Watt's Settlement*, 9 Hare, 106; *O'Reilly v. Alderson*, 8 Hare, 104.

(*m*) *Re Bignold's Settlement Trusts*, 7 L. R. Ch. App. 223.

(*n*) *Re East*, 8 L. R. Ch. App. 735.

(*o*) *Re Moravian Society*, 26 Beav. 101.

(*p*) *Hulme v. Hulme*, 2 M. & K. 682.

(*q*) *Rex v. Lexdale*, 1 Burr. 448; *Ex parte Davis*, 2 Y. & C. C. 468; 3 Mont. D. & De G. 304; and see *Re Breary*, W. N. 1873, p. 48.

¹ *Mass. Gen. Hospital v. Armory*, 12 Pick. 445.

by the Conveyancing and Law of Property Act, 1881, unless a contrary intention is expressed in the instrument creating the trust, the number of trustees may, on the appointment of a new trustee, be increased, and the section applies to trusts created either before or after the commencement of the Act (r).

D'Almaine v.
Anderson.

30. Independently of the recent Act] the power may be so specially worded as to authorize the substitution of *several* trustees * in the place of *one* or of *one* in the place of *several*. Thus, where, a testator appointed two trustees, and directed "that if the trustees thereby appointed, or to be appointed as hereinafter mentioned, should die, &c., it should be lawful for the surviving or continuing trustee or trustees for the time being, or the executors or administrators of the last surviving or continuing trustee, to appoint one or more person or persons to be a trustee or trustees in the room of the trustee or trustees so dying, &c., and thereupon the trustee estates should be vested in the new trustee or trustees, jointly with the surviving or continuing trustee or trustees; or solely, as occasion should require," and the surviving trustee appointed two trustees in the room of the deceased trustee, the late Vice Chancellor of England held that such a case was immediately contemplated by the proviso (s).

[(r) 44 & 45 Vict. c. 41, s. 31.]

(s) D'Almaine v. Anderson, V. C. Feb. 1, 1841. MS.; and in *Meinertzhagen v. Davis*, 1 Coll. 335, the special form of the power was held to authorize the appointment of three trustees in the place of two; and in *Emmet v. Clarke*, 3 Giff. 32, three trustees were held to have been well appointed in the place of four; and in *Hillman v. Westwood*, 3 Eq. Rep. 142, the Court thought that two trustees could be appointed in the place of one. In another case, not reported, the proviso was that "In case any of the several trustees therein named, or any new trustee or trustees to be appointed as hereinafter mentioned, should depart this life, or be desirous to be discharged from the execution of the aforesaid trusts, or should reside abroad or become incapable, or neglect or refuse to act in the trusts of the testator's will before the same should be fully performed, it should be lawful for the remaining surviving or only acting trustee or trustees, and he the said testator did thereby authorize him or them, by any instrument or instruments under his or their hand and seal, to be attested by two or more credible witnesses, to nominate and appoint any other fit person to supply the place of the one so dying or desiring to be discharged, residing abroad, or neglecting or refusing to act thereunder; and thereupon on the happening of any of those events he or they should immediately cease to be such trustee as aforesaid, and be immediately released and discharged from such office; and when and as soon as any such new trustee or trustees should be so nominated, substituted and appointed as aforesaid, all and singular the trust monies, stocks, funds, and securities, messuages, lands, tenements, and heredit-

* [31. So where a testator appointed four [* 661] trustees and declared that "as often as his first or future trustees or any of them should die, &c., he empowered the surviving or continuing trustees or trustee, or if there should be no such trustee, then the retiring or renouncing trustees or trustee, and if there should be no such last mentioned trustee then the executors or administrators of the last deceased trustee, by any deed to appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying, &c.; and upon the appointment of every such new trustee all the trust estates, monies and premises should be thereupon vested in such *new trustee* or trustees either *solely* or jointly with the surviving or continuing trustee or trustees, as occasion should require;" and two of the trustees died and one renounced, and the surviving trustee appointed a single co-trustee, the M. R. said "he was not aware of any rule making it compulsory on the donees of a power appointing new trustees to keep up the full number of trustees except in the case of a charity. If the testator wished the number to be kept up, he must expressly say so. In that case it was clear from the words of the

[Reduction in number of trustees authorized.]

aments in or upon which the same or any part thereof should or might for the time being be invested, should immediately vest in him or them, or the same should with all convenient speed be assigned, conveyed, and assured so that the same should become vested in such surviving and continuing and such new trustees, or *such new trustees or trustee only* as the case might require, and his or their heirs, executors, administrators, and assigns, in the same manner, and with the same powers, authorities, and directions as if he or they had been originally appointed under that his will." There were five trustees, Elizabeth Byrom, Ashton Johnson Byrom, Valentine Byrom, William Corrie, and George Orred. V. Byrom, A. J. Byrom, and G. Orred died, and in March, 1831, Elizabeth Byrom and W. Corrie appointed *Henry Byrom* in the place of *V. Byrom, A. J. Byrom and G. Orred*. In July, 1831, William Corrie died, and in May, 1833, Elizabeth Byrom died, and on June 4, 1833, Henry Byrom appointed *Emma Byrom* in the place of *Elizabeth Byrom*. On June 6, 1883, Emma Byrom, as the remaining trustee, appointed *Peter Ainsworth, Thomas Shaw Brandreth and Edgar Corrie*, in the place of *Henry Byrom* (then retiring), and of the said *A. J. Byrom, V. Byrom, and George Orred*, deceased. In an amicable suit between *cestuis que trust* and trustees for trying the validity of the appointments, it was declared by V. C. Wigram "that the appointment of the defendants *Emma Byrom, Peter Ainsworth, Thomas Shaw Brandreth, and Edgar Corrie* respectively to be trustees under the will of *Ashton Byrom*, deceased, in the pleadings named, was valid and proper, and duly authorized by the power of appointing new trustees contained in the said will." *Corrie v. Byrom, V. C. Wigram, 26 April, 1845, MS.*; and see *Re Breary, W. N. 1873, p. 48*.

will that the testator contemplated the possibility of a single trustee acting alone." And he held that the appointment was valid (*t*). So where one trustee disclaimed, and the other retired, the appointment of a single trustee under the power in Lord Cranworth's Act was supported (*u*).]

Court does not limit itself to original number.

32. And where the Court itself is appointing new trustees, it does not at the present day, though doubts appear to have been formerly felt on the point (*v*), consider itself bound to fill up the precise number only mentioned in the instrument of trust. It has added two new trustees to the two original trustees (*w*), appointed four where the testator originally appointed three (*x*), three where the testator originally appointed two (*y*), and two where the testator originally appointed one (*z*). [* 662] In these cases the number * has been increased, but if the original number was excessive the Court may also reduce it. If, however, two were originally appointed, the Court for security will not, at least where money is concerned, substitute one only (*a*).

Trustee should be within the jurisdiction.

33. In general the new trustees appointed under a power should be persons amenable to the *jurisdiction of the Court*, but where the personal property of a lady was settled on her marriage with a foreigner, whose domicile was in *America* at the time of the marriage, the subsequent appointment of three *Americans* to be trustees was decided to be justifiable (*b*). But though the parties who have a *power of appointment* may exercise it in this way, the *Court* in substituting trustees by its own jurisdiction has refused to appoint new trustees who are *out of the jurisdiction* (*c*). [However, in a recent case where all the parties interested were of age, and they were all resident either in Australia or New

[(*t*) *Cunningham and Bradley's Contract for Sale to Wilson*, W. N. 1877, p. 258; *West of England and South Wales District Bank v. Murch*, 23 Ch. D. 138.]

[(*u*) *West of England and South Wales District Bank v. Murch*, 23 Ch. D. 138.]

(*v*) *Devey v. Peace*, Taml. 78.

(*w*) *Re Boycott*, 5 W. R. 15.

(*x*) *Plenty v. West*, 16 Beav. 35.

(*y*) *Birch v. Cropper*, 2 De G. & Sm. 255.

(*z*) *Plenty v. West*, 16 Beav. 356; *Re Tunstall's Will*, 4 De G. & Sm. 421.

(*a*) *Re Ellison's Trusts*, 2 Jur. N. S. 62; *Porter's Trust*, 2 Jur. N. S. 349; and see *Re Roberts*, 9 W. R. 758.

(*b*) *Meinertzhagen v. Davis*, 1 Coll. 335; [and see *Re Smith's Trusts*, 20 W. R. 695; *Re Cunard's Trusts*, 48 L. J. N. S. Ch. 192; 27 W. R. 52; but see *Re Long's Settlement*, 17 W. R. 218; *Re Austen's Settlement*, 38 L. T. N. S. 601.]

(*c*) *Guibert's Trust*, 16 Jur. 852.

Zealand, the Court appointed two persons resident in Australia new trustees of a settlement (*d*), and the same course has been adopted in other cases where some of the *cestuis que trust* have been infants (*e*).]

34. Should one of two trustees be desirous of retiring, of course he cannot do so without the *substitution of another* in his place (*f*), and the power of appointment of new trustees would not authorize the appointment of the *continuing trustee* as sole administrator of the trust (*g*); for this would, in effect, amount to a relinquishment of the trust without the appointment of any successor (*h*).

One of two trustees retiring and appointment of the co-trustee.

35. [Independently of the power conferred by the recent Act (*i*),] a *surviving trustee* cannot be advised (though it has been sometimes done), to vest the trust estate in himself, and a new trustee appointed in the place of one of *several deceased trustees*, but should refuse to part with the property unless the original number of trustees be restored. Still less could the *representative* of the last surviving trustee be advised to vest the property in a *single new trustee* nominated in the place of one only of the *several deceased trustees*. And where a settlement constitutes *three trustees* with a power of appointment of new trustees in the usual form, * and two die, the *survivor* should re- [* 663] fuse to retire in favour of a *single new trustee* appointed in his place, for, as the original settlement provided three trustees to execute the trust, the donee of the power should not execute the power partially, but should restore the original number (*k*). In a trust for *sale*, if this precaution were not observed, a purchaser on a sale by the new trustee might give trouble by objecting to the title (*l*). The strongest ground for supporting the sale would be, that probably many titles depend on the validity of such an execution of the power, and in recent cases, the appointment has been supported (*m*). *Fieri non debuit, factum valet*. Where

Appointment of one trustee in the place of several.

[*(d)* *Re Drewe's Settlement Trusts*, W. N. 1876, p. 168.]

[*(e)* *Re Liddiard*, 14 Ch. D. 310; and see the cases cited in note (*b*).]

[*(f)* *Adams v. Paynter*, 1 Coll. 532.

[*(g)* *Wilkinson v. Perry*, 4 Russ. 272; see *post*, p. 671.

[*(h)* *Attorney-General v. Pearson*, 3 Mer. 412, *per* Lord Eldon.

[*(i)* 44 & 45 Vict. c. 41, s. 31.]

[*(k)* See *Barnes v. Addy*, 9 L. R. Ch. App. 244; but see *Forster v. Abraham*, 17 L. R. Eq. 351.

[*(l)* See *Earl of Lonsdale v. Beckett*, 4 De G. & Sm. 73; *Meinertzhagen v. Davis*, 1 Coll. 344.

[*(m)* *Re Pool Bathurst's Estate*, 2 Sm. & G. 169; *Reid v. Reid*, 30 Beav. 388; and see *Re Fagg's Trust*, 19 L. J. N. S. Ch. 175.

the power in the will was "to appoint *one or more* new trustee or trustees in the room of the *trustee or trustees* so dying," and both trustees died, and the donee of the power appointed a single trustee in the place of both, the appointment was established (*n*).

[44 & 45 Vict.
c. 41.]

[36. Now, by the Conveyancing and Law of Property Act, 1881 (*o*), sect. 31, sub-sect. (3), on an appointment of a new trustee, it shall not be obligatory to appoint more than one new trustee, where only one trustee was originally appointed, or to fill up the original number of trustees, where more than two trustees were originally appointed; but, except where only one trustee was originally appointed, a trustee shall not be discharged under this section from his trust unless there will be at least two trustees to perform the trust.]

Rectification
of bad ap-
pointment.

37. If A. and B. be trustees, with a power of appointment of new trustees limited to "the acting trustees or trustee, or the executors or administrators of the surviving trustee," and then A. dies, and B. retires and appoints C. a trustee in his *own* place, and afterwards dies and appoints an executor, who as the donee of the power for the time being appoints C. and D. in the place of A. and B., the new trustees are properly appointed, and can sign receipts; for either the original appointment of C. was good, and the subsequent appointment of D. [having been made with the concurrence of C.] filled up the number, or the original appointment of C. was invalid, and then the appointment of both C. and D. by the donee of the power was effectual (*p*).

[Concurrence
of retiring
trustee not
necessary.]

[38. Where the power of appointing new trustees is given to the surviving or continuing trustees or trustee, [* 664] and a trustee retires, * his concurrence is not necessary in the appointment of a new trustee in his place, but such appointment rests with the other trustees or trustee who do not retire (*q*).

A surviving
trustee ap-
pointing two
trustees in
the place of
himself and
the deceased
trustee.

39. It sometimes happens where the power of appointment of new trustees is limited to the "*surviving or continuing* trustee," that one trustee *dies*, and then the other wishing to retire proposes to appoint two new trustees at the same time in the place of himself and the deceased trustee. A doubt has, however, been suggested whether the word *surviving* must not be read as

(*n*) Wood v. Ord, M. R. 1st July, 1793, MS.

[(*o*) 44 & 45 Vict. c. 41.]

(*p*) Miller v. Priddon, 1 De G. M. & G. 335.

[(*q*) *Re Norris*, 27 Ch. D. 333; *Travis v. Illingworth*, 2 Dr. & Sm. 344; but see *Re Glenny and Hartley*, 25 Ch. D. 611.]

applicable only to an appointment in the room of a *deceased* trustee; and, as the word *continuing* cannot include *retiring*, the safer course is for the *surviving* trustee first to appoint a person in the room of the deceased trustee, and then the person so substituted may, as the *continuing* trustee, appoint a new trustee in the place of the trustee desirous of retiring (*r*).

40. And if there be *two* trustees, and a power of appointing new trustees be given to "the surviving or continuing trustees or trustee," it has been held that they cannot both *retire* at the same time, but that there must be two successive appointments, as in the case last mentioned (*s*); and if there be *three* trustees with the like power and *two* die, and the surviving trustee wishes to retire, then he is not a *continuing* trustee, and therefore he cannot retire and appoint two others in the place of *himself* and a deceased trustee (*t*).

Case of both trustees wishing to retire.

[But under the Conveyancing and Law of Property Act, 1881, the provisions of the Act relative to the appointment of new trustees by a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of those provisions (*u*); and a retiring trustee can, accordingly, under the Act appoint new trustees in the place of himself and a deceased trustee, or in the place of himself alone if he was originally the sole trustee.]

* 41. Where four trustees were appointed [* 665] originally, and the power was to the surviving or continuing or *other* trustee to appoint, it was held that the survivor of the four trustees who desired himself to be discharged, could, by force of the words "other trustee," appoint four new trustees in the place of himself and three others (*v*).

Power to "other trustee."

(*r*) See *Nicholson v. Wright*, 26 L. J. N. S. Ch. 312; S. C. nom. *Nicholson v. Smith*, 3 Jur. N. S. 313. But see *Pell v. De Winton*, 2 De G. & J. 17.

(*s*) *Stones v. Rowton*, 17 Beav. 308; S. C. 1 Eq. Rep. 427.

(*t*) *Travis v. Illingworth*, 2 Dr. & Sm. 344; [*Re* *Norris*, 27 Ch. D. 333. *Travis v. Illingworth*, has been directly called in question by V. C. Bacon in the recent case of *Re* *Glenny and Hartley*, 25 Ch. D. 611, in which the V. C. expressed his opinion that the retiring trustees could execute the power. It is, however, to be observed that the power in that case contained special words, showing that the words "continuing trustees" were not used in their strict sense, but as including trustees who were being discharged, and on the general question the argument of the V. C. does not seem to be so well founded as that of V. C. Kindersley in *Travis v. Illingworth*, and has since been disapproved of, *Re* *Norris*, *ubi supra*.]

[(*u*) 44 & 45 Vict. c. 41, s. 31, sub-s. (6).]

(*v*) *Lord Camoys v. Best*, 19 Beav. 414.

Power to
"acting
trustees."

42. Where persons are nominated trustees in a will, and a power of appointing new trustees is given to the "acting" trustees, should all the trustees disclaim, the power of appointment is gone, and the *hiatus* in the trust can only be filled up by the Court. It has, occasionally, been suggested that the trustees, instead of disclaiming, should accept the trust to the extent of exercising the power only, and should, by virtue of it, appoint new trustees (*w*); but it is conceived that trustees who availed themselves of the office for the purpose only of introducing other parties into the trust would be rather "refusing" than "acting" trustees, and that the exercise of the power, under such circumstances, would be nugatory, and might involve the outgoing trustees in serious liabilities.

Power to the
"said
trustees."

43. The power of appointment is sometimes given "to the *said trustees*," and then the question arises whether a sole survivor can appoint. It is conceived that "the *said trustees*" means the persons or person representing the trust for the time being under the settlement, and that the survivor can therefore exercise the power.

Appointment
of a *cestui
que trust* or
near relative
*cestui que
trust* as
trustee.

44. On a change of trustees it is not uncommonly proposed to appoint one of the *cestuis que trust* to that office, but such an arrangement is evidently irregular, as each *cestui que trust* has a right to insist that the administration of the property should be confided to the care of some third person whose interest would not tend to bias him from the line of his duty. Should proceedings be instituted for the removal of the *cestui que trust*, and the substitution of some indifferent person as trustee, the costs might be thrown upon the parties who had improperly filled up the trust (*x*). But it is presumed that this rule affects the parties to the trust only, and that if a *cestui que trust* who has been appointed a trustee sell real estate under a power of sale, he may sign a receipt, and that the purchaser is not bound to look to the proper exercise of the discretion in such a case (*y*). *Cestuis que trust* are not absolutely *incapacitated* from being trustees, as the Court itself under special [* 666] * circumstances appoints a *cestui que trust* a trustee (*z*). The question is merely one of relative

(*w*) See *Sharp v. Sharp*, 2 B. & Ald. 415; and *Re Hadley*, 5 De G. & Sm. 67, where power was expressly given to a declining trustee.

(*x*) See *Passingham v. Sherborn*, 9 Beav. 424.

(*y*) See *Reid v. Reid*, 30 Beav. 388; *Forster v. Abraham*, 17 L. R. Eq. 351.

(*z*) *Ex parte Clutton*, 17 Jur. 988; *Ex parte Conybeare's Settlement*, 1 W. R. 458; *Forster v. Abraham*, 17 L. R. Eq. 351.

fitness. *A fortiori*, the circumstance of near *relationship* to the *cestui que trust* creates no absolute disqualification for the office of trustee, though Sir John Romilly, M.R., objected, where it could be avoided, to appoint relatives as trustees (a).

[45. The Court will not appoint the tenant for life (b), or the solicitor of the tenant for life (c), to be a trustee for the purposes of the Settled Land Act, 1882; and has even refused to appoint two brothers trustees, and required two *independent* persons to be appointed (d).]

[Appointment of tenant for life.]

46. The question is often asked, whether the donee of the power can appoint himself a trustee, and, as no one can be judge in his own case, such an appointment would be open to objection (e). Should the execution of the trust have been committed to trustees and the survivor of them, his *executors and administrators*, and the trustees die, and the power of appointment is in the executor of the survivor, here it may be said that as by the terms of the trust the executor was declared to be a proper person to execute the trust, the executor has the settlor's warrant for the appointment of *himself* and another. It may still, however, be observed, that the exercise of every power should be regulated by the circumstances as they stand at the time, and that the limitation to executors *à priori* cannot dispense with the discretion to be applied afterwards.

Whether donee of power can appoint himself trustee.

47. Where estates of a different description, or held under a different title, or limited upon different trusts, have been vested in the same trustees by the settlor, and there is a single power of appointment of new trustees in the usual form, it [was at one time thought] that there was no authority for afterwards dividing the trust by the appointment of one set of new trustees to execute the trusts of the one estate, and a distinct set of new trustees to execute the trusts of the other (f); and it [was even held in one case] upon a petition under the Trustee Acts, that the Court had no jurisdiction to make such an order (g). [But where * there was no op- [* 667] position to the order, the Court in several subsequent cases appointed new trustees under the Trustee Acts of one of several trusts held under the same instrument

Of severing a trusteeship.

(a) *Wilding v. Bolder*, 21 Beav. 222; and see *ante* p. 41.

[(b) *Re Harrop's Trusts*, 24 Ch. D. 717.]

[(c) *Re Kemp's Settled Estates*, 24 Ch. D. 485.]

[(d) *Re Knowles' Settled Estates*, 27 Ch. D. 707.]

(e) See *ante*, p. 316.

(f) See *Cole v. Wade*, 16 Ves. 27; *Re Anderson*, L.L. & G. t. Sugd. 29.

(g) *Re Dennis's Trusts*, 12 W. R. 575; 3 N. R. 636.

without dealing with the other funds (*h*); and in an administration action it was held by Fry, J., that the Court had jurisdiction to appoint separate sets of trustees (*i*). Now, by the Conveyancing Act, 1882 (*k*), it is enacted, that on an appointment of new trustees, a separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property; or, if only one trustee was originally appointed, then one separate trustee may be so appointed for the first-mentioned part; and this section applies to trusts created either before or after the commencement of the Act.

It is conceived that if a trustee desire to retire from the trusteeship so far as it relates to a particular part of the trust property, and to continue a trustee as to the other parts held on distinct trusts, the intention may be effected under this section by the appointment of a new trustee or new trustees of the particular part, and constituting a separate trusteeship for that part. So if the continuing trustee desire to remain a trustee as to the whole trust property, but to appoint new trustees to act with himself so far only as relates to a particular part held on separate trusts, the object may be effected under this section (*l*).]

Directory
powers.

48. The proviso is sometimes of such a directory character as to authorize the appointment of new trustees upon one event, without the intention of confining the exercise of the power to the occurrence of that event exclusively. Thus, where six trustees were empowered, *when reduced to three*, to fill up the number, and all died but one, it was held competent to the survivor to execute the appointment (*m*). So, where the original number of trustees was twenty-five, and they were directed, *when reduced to fifteen*, to proceed to nominate others, it was determined that, when seventeen remained, the survivors *might* elect, but when reduced to only fifteen they were *compellable* to elect (*n*). It should be observed that these were cases of *charitable*

(*h*) *Re Cotterill's Trusts*, W. N. 1869, p. 183; *Re Cunard's Trusts*, 48 L. J. N. S. Ch. 192; 27 W. R. 52, and the cases there cited.]

(*i*) *Re Grange*, 29 W. R. 502; 42 L. T. N. S. 469.]

(*k*) 45 & 46 Vict. c. 39, s. 5.]

(*l*) *Re Paine's Trust*, W. N. 1885, p. 42; now reported in 28 Ch. D. 725.]

(*m*) *Attorney-General v. Floyer*, 2 Vern. 748; and see *Attorney-General v. Bishop of Lichfield*, 5 Ves. 825; but see *Foley v. Wontner*, 2 J. & W. 245.

(*n*) *Doe v. Roe*, 1 Anst. 86.

trusts, in which a greater latitude of construction is allowed than in ordinary trusts (o).

* 49. If a tenant for life has a power of ap- [* 668] Tenant for life disposing of his life estate.
pointing new trustees and sells his life interest, the power [is not thereby destroyed, but is still exercisable with the consent of the person to whom the beneficial interest has been aliened (p). So if the tenant for life] has only mortgaged his life interest, he may not be able to appoint a trustee behind the back of the mortgagee, but there can be no objection to such an exercise of the power, if it be done with the consent of the mortgagee.

[It has recently been held (q) that the power is exercisable by the tenant for life, even without the consent of the alienee, but it is submitted that this must be subject to the implied condition that there is nothing in the appointment prejudicial to the interest of the alienee. This condition has been expressly recognised in several of the earlier cases (r), and is in accordance with sound principle; and it is conceived that, notwithstanding the recent case of *Hardaker v. Moorhouse*, it will be the wiser course to procure the consent of the alienee to the appointment.]

50. Advantage cannot be taken of the power for the purposes of profit; and therefore if the donee of the power appoint a person a trustee in consideration of a sum of money paid by him for the office, the appointment cannot stand (s). And if a trustee refuse, when solicited, to commit a breach of trust himself, but declares his willingness to resign in favour of some other person less scrupulous, the Court, acting upon the principle of *qui facit per alium facit per se*, will hold the trustee who retires responsible for the misbehaviour of the trustee he has substituted (t). And upon principle it would seem that a bond of indemnity given to the retiring trustee would be a very doubtful security

Trustee cannot retire in consideration of a premium, or in favour of another who intends to commit a breach of trust.

(o) See *ante*, p. 601.

(p) *Alexander v. Mills*, 6 L. R. Ch. App. 124. See *Holdsworth v. Goose*, 29 Beav. 111, and cases cited *Ib.*; *Nelson v. Seaman*, 1 De G. F. & J. 368; *Lord Leigh v. Ashburton*, 11 Beav. 470; *Eisdell v. Hammersley*, 31 Beav. 255; *Walmesly v. Butterworth*, Coote on Mortgages, App. 3rd Ed. p. 572; *Warburton v. Farn*, 16 Sim. 625.

(q) *Hardaker v. Moorhouse*, 26 Ch. D. 417.]

(r) *Alexander v. Mills*, 6 L. Ch. App. 124; *Holdsworth v. Goose*, 29 Beav. 111; *Eisdell v. Hammersley*, 31 Beav. 255; and see *Re Cooper*, 27 Ch. D. 565; and cf. 45 & 46 Vict. c. 38, s. 50.]

(s) *Sugden v. Crossland*, 3 Sm. & G. 192.

(t) *Norton v. Pritchard*, Reg. Lib. B. 1844, 771; *Le Hunt v. Webster*, 8 W. R. 434; reversed 9 W. R. 918; *Clark v. Hoskins*, 36 L. J. N. S. Ch. 689; *Palairat v. Carew*, 32 Beav. 567.

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against the consequences of the act, for the bond itself if found to be infected with fraud could afford no just ground for action (*u*). However, in a recent case, it was held by the Court of Exchequer that the common law Courts have no such cognizance of breaches of [*669] * trust as to treat a bond of indemnity against an act amounting in equity to a breach of trust as necessarily containing anything *illegal* (*v*).

Improper appointment by donee of power. 51. If a tenant for life, with a power of appointment of new trustees, *appoint improper persons* to the trust, he will be personally liable for the costs of a suit for removing the objectionable trustees (*w*).

Result where a new trustee is ineffectually appointed. 52. If a new trustee be *ineffectually appointed*, the old trustees may exercise the powers given to them by the instrument of trust, notwithstanding the ineffectual attempt (*x*). But if a trustee retire upon the appointment of a new trustee, and from want of the proper formalities being observed the appointment is not legal, the old trustee cannot lie by for a long interval and then exercise a power by mere concurrence in the deed, without *bonâ fide* exercising his own judgment and discretion (*y*).

Lis pendens: 53. If the *administration of the trust* be in the hands of the Court, the donee of the power cannot exercise it without having first obtained the Court's approbation of the person proposed (*z*). However, if the old trustees do appoint without the leave of the Court, the act is not to be considered as altogether void in itself, but it puts the burthen upon them of proving, and that by the strictest evidence, that what was done was perfectly right; and also saddles them with the costs of that proof. If the act was not proper, of course the appointment will be cancelled (*a*).

How the costs are to be borne. 54. On the appointment of a new trustee under a power, the *costs* fall on the *corpus* of the trust estate. In strictness the costs of appointing new trustees should

(*u*) See *Shep. Touch.* 132, 371.

(*v*) *Warwick v. Richardson*, 10 M. & W. 284; and see *Lord Newborough v. Schröder*, 7 C. B. 342; *Dugdale v. Lovering*, 10 L. R. C. P. 196.

(*w*) *Raikes v. Raikes*, 32 Beav. 403.

(*x*) *Warburton v. Sandys*, 14 Sim. 622; *Miller v. Priddon*, 1 De G. M. & G. 335.

(*y*) *Lancashire v. Lancashire*, 2 Ph. 657; 1 De G. & Sm. 288.

(*z*) *Webb v. Earl of Shaftesbury*, 7 Ves. 480; *Attorney-General v. Clack*, 1 Beav. 467; *Peatfield v. Benn*, 17 Beav. 552; *Middleton v. Reay*, 7 Hare, 106; *Kennedy v. Turnley*, 6 Ir. Eq. Rep. 399; [*Re Gadd*, 23 Ch. D. 134; and see *ante*, p. 617.]

(*a*) *Attorney-General v. Clack*, 1 Beav. 473, *per* Lord Langdale; and see *Cafe v. Bent*, 3 Hare, 249.

be governed by the same principles as the payment of fines on admission to copyholds (*b*). But on the appointment of new trustees by the Court the costs are always thrown upon the estate, and the practice in Court regulates the practice out of Court (*c*). Where there is no fund readily available the costs are often paid by the tenant for life.

55. On the appointment of new trustees of a *charity*, Inrolment the * conveyance of real estate which is already [* 670] in case of in mortmain need not be *inrolled* (*d*). charity.

56. Where new trustees are appointed under a power, Powers of it is presumed that they can exercise all the *powers* new trustees. given to the *original trustees* in that character; but in penning a power of appointment of new trustees, all questions should be obviated by an express direction that the new trustees shall have the same powers as if originally appointed (*e*).

57. A trustee upon transferring the trust estate to a *newly appointed trustee* is not allowed to charge it with *copies*. the expense of an *attested copy* of the settlement where he has already an ordinary copy, or with the expense of a *duplicate* of the deed of new appointment, though he is entitled to an examined copy of it. The *extra* evidence is considered as incurred for the satisfaction of the trustee from an excess of caution, and, if required, must be paid for by himself (*f*).

58. If newly appointed trustees *omit to inquire of a retiring trustee* whether he has notice of any charge, *Inquiries to be made by* and then having no notice, they distribute the fund to *incoming trustee* the prejudice of the incumbrancer, they will not be liable to him on the ground that it was their duty to have made inquiry of the retiring trustee, in which case they would have known of the incumbrance (*g*).

[59. Under sect. 5 of 22 & 23 Vict. c. 61, the Court has jurisdiction where a final decree of nullity of marriage or dissolution of marriage has been made to extinguish or vary the power of appointing new trustees of the settlements made by the parties to the marriage (*h*).

(*b*) See *ante*, p. 379.

(*c*) *Palmer's Settlement*, V. C. Kindersley, 18 April, 1857; *Carter v. Sebright*, 26 Beav. 376; see *post*, p. 672.

(*d*) *Ashton v. Jones*, 28 Beav. 460; and see *Shelf. Mortm.* 130.

(*e*) In appointments under the statutory powers this is expressly provided for; 23 & 24 Vict. c. 145, s. 27; 44 & 45 Vict. c. 41, s. 31.]

(*f*) *Warter v. Anderson*, 11 Hare, 301; S. C. 1 Eq. Rep. 266.

(*g*) *Phipps v. Lovegrove*, 16 L. R. Eq. 80.

(*h*) *Oppenheim v. Oppenheim*, 9 P. D. 60; *Maudslay v. Maudslay*, 2 P. D. 256.]

Thirdly. Of the discharge of the trustee by the authority of the Court.

Suit to be discharged from the trust.

1. The trustee may, in every proper case, although the contrary appears to have been at one time supposed (*i*), get himself discharged from the office on application to the Court. A power of appointment of new trustees is very frequently omitted in settlements, or the donee of the power either cannot or will not exercise it, and were there no means by which a trustee [* 671] could ever denude * himself of that character, it would operate as a great discouragement to mankind to undertake so arduous a task.

Where no new trustee can be found.

2. Where *no new trustee can be found* willing to act, the trustee's right to be discharged must depend upon the circumstances of the case. "It is a mistake," observed Lord St. Leonards, "to suppose that a trustee who is *entitled to be discharged* is bound to show to the Court that another person is ready to accept the office; the Court will at once refer it to the Master to appoint a new trustee. But if no one can be found who will accept the trust, the Court may find itself obliged to keep the old trustee before the Court, but will take care to protect him in the meantime" (*k*). This was said in a case where the trustee, from the conduct of the *cestui que trust*, could claim to be discharged; but if a trustee wish to retire from mere *caprice*, it is not clear that the Court can or will discharge him, unless another trustee can be found in substitution (*l*). It is certain that the Court cannot divest him of the *estate* before some one can be found to take it, and even as to the *office* it is not unreasonable, that if a man once engages to undertake it, he shall not retire from it without any reason, and so leave the estate without a trustee. But every trustee may relieve himself from the liabilities of the office by submitting the administration of the trusts to the jurisdiction of the Court (*m*). In a case where there was a power of appointing new trustees, with a direction that the number might be augmented or reduced, and one of the three trustees wished to retire, but no new trustee could be found, the Court, under the Trustee Acts, appointed the two continuing trustees to be the sole trustees (*n*); [but in similar cases the Court

(*i*) *Hamilton v. Fry*, 2 Moll. 458.

(*k*) *Courtney v. Courtney*, 3 Jon. & Lat. 533; and see *Forshaw v. Higginson*, 20 Beav. 487.

(*l*) *Ardill v. Savage*, 1 Ir. Eq. Rep. 79.

(*m*) See *Forshaw v. Higginson*, 20 Beav. 485; *Gardiner v. Downes*, 22 Beav. 397.

(*n*) *Re Stokes' Trusts*, 13 L. R. Eq. 333. [The order in this

now refuses to make the order, and requires a new trustee to be appointed, unless the whole of the fund is immediately divisible (*o*).]

3. Formerly the application to the Court to be discharged from the trust was in general made by *bill*, in order to give the Court an * opportunity of examining into the merits of the case (*p*); but if a suit were already pending, the trustee might then solicit his dismissal by *petition* or *motion* (*q*). It was formerly not the custom of the Court to look through the proceedings, but a reference was ordered to the Master (*r*). Under the present practice the Court, except in cases of special difficulty, usually appoints a trustee without a reference to chambers, and without a suit, under the provisions of the Trustee Acts.

How application to be discharged from the trust should be made.

4. If part of the original trust estate is *supposed to be lost*, or is *not forthcoming*, the Court will not appoint new trustees of the *residue*, so as to make them *partial trustees* only, but will appoint them *trustees generally*; and, if required, will at the same time, for the protection of the trustees, direct an inquiry whether any part of the trust fund has been lost, and what steps should be taken for its recovery (*s*).

Part of the trust estate lost.

5. The *costs* where the trustee retires from *caprice* or *without sufficient reason* must be borne by himself (*t*); but where he retires from necessity, or on good and sufficient ground, they will be thrown upon the trust estate (*u*). Where the trust was originally a simple one, but has become embarrassing from its complications, the trustee may commence an action to be relieved, and will be allowed his costs, for although he might

Costs.

case was prefaced thus, "A. and B. by their counsel desiring to retire, &c., in order that A. and B. may be appointed to act alone as trustees, &c." See Seton on Decrees, 4th ed. p. 540; and this case was followed in *Re Tatham's Trust*, W. N. 1877, p. 259; *Re Harford's Trusts*, 13 Ch. D. 135; *Re Shipperdson*, W. N. 1880, p. 155; *Re Northrop*, W. N. 1880, p. 184; but since the contrary decisions in *Re Colyer*, 50 L. J. N. S. Ch. 79; and *Re Aston*, 23 Ch. D. 217, a similar order is not likely to be made; *Re Lamb's Trusts*, 28 Ch. D. 77.]

[(*o*) See cases in last note, and *Re Martyn*, 26 Ch. D. 745.]

(*p*) See *Ex parte Anderson*, 5 Ves. 243; *Re Fitzgerald*, Ll. & G. t. Sugd. 22; *Re Anderson*, Ib. 29.

(*q*) — *v. Osborne*, 6 Ves. 455; — *v. Robarts*, 1 J. & W. 251.

(*r*) — *v. Osborne*, 6 Ves. 455.

(*s*) *Bennett v. Burgis*, 5 Hare, 295.

(*t*) *Howard v. Rhodes*, 1 Keen, 581; *Porter v. Watts*, 16 Jur. 757; *Hamilton v. Fry*, 2 Moll. 458.

(*u*) *Greenwood v. Wakeford*, 1 Beav. 581; *Forshaw v. Higginson*, 20 Beav. 486; *Courtenay v. Courtenay*, 3 Jon. & Lat. 529; *Gardner v. Downes*, 22 Beav. 395; see *ante*, p. 669.

have paid the trust fund into Court under the Trustee Relief Act, this would not have saved him from being sued, except as to the particular sum paid into Court (*v*).

Application
by repre-
sentative of
deceased
trustee.

6. A distinction was taken by Lord Langdale between the case where the same person who accepted the trust comes to be relieved from it, in whom it would be caprice to relinquish the trust without any sufficient reason, and the case where on that person's death, the trust devolves on his *representative* by operation of law, and the *representative* applies to the Court (*w*). And where the *executor* of a trustee declined to act as trustee, and a bill was filed against him to have new trustees appointed, and that the executor might pay the costs, the [* 673] Court said the executor had * a perfect right to decline acting in the trusts, and allowed him his costs (*x*).

Complication
of the trust
by the acts
of the tenant
for life.

7. Where the settlement contained a power of appointment of new trustees, and the tenant for life having incumbered his life-estate with annuities and other charges, the original trustees were desirous of relieving themselves from the difficulties of their situation by retiring from the trust, and the tenant for life who was the donee of the power could not find any person to undertake the trust, the costs of the suit which the trustees had instituted for their discharge were thrown exclusively upon the fund of the *tenant for life* (*y*).

Executor
cannot be
discharged.

8. An *executor* is regarded in some sense as a trustee, but he cannot, like a trustee, be discharged, even by the Court, from his *executorship*. When the funeral and testamentary expenses, debts, and legacies have been satisfied, and the surplus has been invested upon the trusts of the will, the executor then drops that character and *becomes a trustee* in the proper sense, and may then be discharged from the office like any other trustee.

(*v*) *Barker v. Peile*, 2 Dr. & Sm. 340.

(*w*) 1 Beav. 582; and see *Aldridge v. Westbrook*, 4 Beav. 212.

(*x*) *Legg v. Mackrell*, 1 Giff. 165; 2 De G. F. & J. 551.

(*y*) *Coventry v. Coventry*, 1 Keen 758.

* PART III.

[* 674]

THE CESTUI QUE TRUST.

CHAPTER XXVI.

IN WHAT THE ESTATE OF THE CESTUI TRUST PRIMARILY CONSISTS.

HAVING concluded the subject of the *estate* and *office* of the trustee, it follows next that we investigate the nature and properties of the *Estate* of the *cestui que trust*; and in the present chapter we shall inquire in what the estate of the *cestui que trust* primarily consists. *First*, In the *simple* trust; and *Secondly*, In the *special* trust.

SECTION I.

OF THE CESTUI QUE TRUST'S ESTATE IN THE SIMPLE TRUST.

In the *simple* trust the equitable ownership is compounded of the *Pernancy* of the profits and the *Disposition* of the estate—the *jus habendi* and *jus disponendi* (2).

First. The equitable owner is entitled to the *pernancy* of the profits.

1. In a trust of lands the *cestui que trust* may compel the trustee to put him in possession of the estate (a); and if the *cestui que trust* be ejected from the possession by the trustee, the *cestui que trust* may compel the trustee to account not only for the rents actually received, but for the whole rents legally demandable from the tenants (b). *Cestui que trust* entitled to possession of lands.

(2) *Smith v. Wheeler*, 1 Mod. 17, per *Pemberton*, J.

(a) *Brown v. How*, Barn. 354; *Attorney-General v. Lord Gore*, Id. 150, per *Lord Hardwicke*.

(b) *Kaye v. Powel*, 1 Ves. Jun. 408.

Exceptions
to the rule.

[*675] *2. The rule which gives the *cestui que trust* the possession is applicable only to the simple trust in the strict sense, for where the *cestui que trust* is not exclusively interested, but other parties have also a claim, it rests in the discretion of the Court whether the actual possession shall remain with the *cestui que trust* or the trustee, and if possession be given to the *cestui que trust*, whether he shall not hold it under certain conditions and restrictions (c).

Blake v.
Bunbury.

Thus a testator devised all his real estate to trustees in fee, upon trust to convey the same for a term of 500 years (the trusts of which were to raise certain *annuities* and *sums in gross*), and subject thereto to the use of A. for life with remainders over. A. filed a bill, praying to be let into possession. At the hearing of the cause a general account was directed of the testator's estates and of the charges upon them, and the plaintiff further desired that he might be let into *immediate possession*; but Lord Thurlow said, "It is impossible for me to let him into possession till I have the accounts before me, and even till the trusts are executed, unless, as he now offers, he pays into Court a sum sufficient to answer all the purposes of the trust. The Court, perhaps, has let a tenant for life into possession, where it has seen that the best way of performing the trust would be by letting him into possession, as where an annuity of 100*l.* a year is charged upon an estate of 5000*l.* a year; but till the account is taken I do not know but the purposes of the trust may take up the whole, and if I was to do it now, perhaps I should only have to resume the estate" (d). The accounts were afterwards taken, and the plaintiff was let into possession on giving *security* to the amount of 10,000*l.* to abide the order of the Court as to the annuities and other incumbrances (e).

Tidd v.
Lister.

In another case (f), a testator devised and bequeathed all his real and personal estate to trustees upon trust to pay his funeral expenses and debts, to keep the buildings upon the estate insured against fire, to satisfy the premiums upon two policies of insurance on the lives of his two sons, to allow his said sons an

(c) *Jenkins v. Milford*, 1 J. & W. 629; *Baylies v. Baylies*, 1 Coll. 537; and see *Denton v. Denton*, 7 Beav. 388; *Pugh v. Vaughan*, 12 Beav. 517; *Hoskins v. Campbell*, W. N. 1869, p. 59; *Etchells v. Williamson*, W. N. 1869, p. 61.

(d) *Blake v. Bunbury*, 1 Ves. jun. 194. See the case more fully stated, *Ib.* 514; 4 B. C. C. 21.

(e) S. C. 1 Ves. jun. 514, 4 B. C. C. 28.

(f) *Tidd v. Lister*, 5 Mad. 429.

annuity of sixty guineas each, and subject thereto upon trust for his daughter for life with remainders over; and the personal estate having sufficed to discharge the funeral expenses, debts and annuities, the daughter, who was then a *feme covert*, filed a bill praying to be * let into possession upon securing the amount [* 676] of the premiums of the policies: but Sir J. Leach said that if a testator, who gave in the first instance a beneficial interest for life only, thought fit to place the direction of the property in other hands, which was an obvious means of securing the provident management of that property for the advantage of those who were to take in succession, a Court of equity ought not to disappoint that intention by delivering over the estate to the *cestui que trust* for life, unprotected against that bias which he must naturally have to prefer his own interest to the fair right of those who were to take in remainder. There might be cases in which it was plain from the *expressions in the will*, that the testator did not intend the property should remain under the personal management of the trustees: there might be cases in which it was plain from the *nature of the property*, that the testator could not mean to exclude the *cestui que trust* for life from the personal possession of the property, as in the case of a family residence. There might be very special cases in which the Court would deliver the possession of the property to the *cestui que trust* for life, *although the testator's intention appeared to be that it should remain with the trustees*; as, where the personal occupation of the trust property was beneficial to the *cestui que trust*; in which case the Court, by taking means to secure the due protection of the property for the benefit of those in remainder, would in substance be performing the trust according to the intention of the testator. And his Honour, considering that there was no such ground of exception in the case before him, refused the application (f) ¹.

3. In one case a *feme covert* was entitled to her *separate use* for her life, and it was not thought incompatible with the nature of such an estate that she should be put into possession, though the claim was opposed

Cestui que trust for her separate use.

(f) And see *Wade v. Wilson*, 33 W. R. 610.

¹ See *Matthews v. McPherson*, 65 N. C. 189. If the intention of the settlor is that *cestui que trust* shall have possession of the land, as *e. g.*, for a place of residence, that intention must be carried into effect. *Campbell v. Prestons*, 22 Gratt. 396.

by the trustees (*g*). A tenant for life cannot claim possession as a *right*, but only at the discretion and by the sufferance of the Court; and therefore, where trustees were directed as managers of the estate to pay insurances and repairs and other necessary outlays, and apply the net annual income to the separate use of a person for life, it was held that such tenant for life was not a person "entitled to possession or receipt of the rents and profits" for life within the meaning of the Leases and Sales of Settled Estates Act, and could not [*677] therefore grant leases under the * Act. Such a power would in fact *pro tanto* neutralize the powers of management vested in the trustees (*h*).

Cestui que trust cannot recover the possession at law.

4. Until a recent Act, to be noticed presently, the *cestui que trust's* right to the possession was recognized, we must remember, in a Court of *equity* only; for in a Court of *law* the *cestui que trust* was merely tenant at will (*i*)¹ and this tenancy was determinable at any time on *demand of possession* by the trustee, though not before such demand (*k*). The doctrines advanced by Lord Mansfield in the last century were long ago over-ruled. It was maintained in his day, that a *cestui que trust*, a plaintiff in ejectment, could not be non-suited by a term outstanding in his trustee (*l*); and that a trustee, a plaintiff in ejectment, could not re-

(*g*) *Horner v. Wheelwright*, 2 Jur. N. S. 367; and see *Hoskins v. Campbell*, W. N. 1869, p. 59; *Taylor v. Taylor*, 20 L. R. Eq. 297.

(*h*) *Taylor v. Taylor*, 20 L. R. Eq. 297. [But see observations of L. J. James in *Taylor v. Taylor*, 3 Ch. D. 147; and see *Vine v. Raleigh*, 24 Ch. D. 238; where it was held that if an estate is vested in trustees, and there is not for the time being any person beneficially entitled to the rents and profits, the trustees are the persons who may under the 23rd section of the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), apply to the Court to exercise the powers conferred by the Act; and a distinction was drawn between the language of that section and that of the 46th section, under which the person entitled to the possession or to the receipt of the rents and profits of the settled estates for an estate for life, &c., *either in his own right or in right of his wife* (words pointing to a *beneficial* ownership) is authorized to grant leases for twenty-one years.] And see *Wade v. Wilson*, 33 W. R. 610.

(*i*) *Garrard v. Tuck*, 8 C. B. 231; *Melling v. Leak*, 1 Jur. N. S. 759; *Parker v. Carter*, 4 Hare, 400; *Perry v. Shipway*, 1 Giff. 1; and see *Geary v. Bearcroft*, O. Bridgm. 486-490; *Bac. Us. 5*; *Doe v. Jones*, 10 B. & Cr. 718; *Doe v. McKaeg*, 10 B. & Cr. 721; *post*, Chap. xxx. s. 1.

(*k*) *Doe v. Phillips*, 10 Q. B. 130.

(*l*) *Lade v. Holford*, B. N. P. 110. The doctrine is said to have originated with Mr. Justice Grundy.

¹ The trustee of the freehold is alone recognized as owner in a Court of law, *Wickham v. Berry*, 55 Pa. St. 70.

cover against his own *cestui que trust* (*m*). It was even decided that, where a term had been created for securing an annuity, and subject thereto upon trust to attend the inheritance, the tenant of the freehold was entitled to recover the possession (provided he claimed subject to the charge), notwithstanding the legal term was outstanding in a trustee upon trusts that were still unsatisfied (*n*). Such at least were the doctrines in cases of *clear* trusts: for where the equity was at all *doubtful*, the rights of the parties were even then referred to the proper tribunal (*o*). "Lord Mansfield," as Lord Redesdale observed, "had on his mind prejudices derived from his familiarity with the Scotch law, where law and equity are administered in the same Courts" (*p*). From the time of Lord Mansfield, and until the recent Act, it was established: — *First*, that a *cestui que trust* could * not recover in ejectment (*q*), [* 678] unless a surrender to him of the legal estate could be reasonably presumed (*r*), (which, of course, could not be where the circumstance of the outstanding legal estate appeared on the declaration or special case (*s*), and the *cestui que trust* had no alternative but to bring his action in the name of the trustee, who was to be indemnified against the costs (*t*): *Secondly*, that the trustee, as the tenant of the legal estate, might recover in ejectment from his own *cestui que trust* (*u*); and the *cestui que trust* had no defence to the action at law, but must have had recourse to an injunction in equity (*v*), and the clause in the Common Law Procedure Act, 1854, which authorized an equitable defence at law did not apply to ejectment (*w*). However, a lessee under

(*m*) *Armstrong v. Peirse*, 3 Burr. 1901.

(*n*) *Bristow v. Pegge*, 1 T. R. 758, note (*a*); overruled by *Doe v. Staple*, 2 T. R. 684.

(*o*) *Doe v. Pot., Doug.* 695; *per* Lord Mansfield; *Goodright v. Wells*, Id. 747, *per eundem*.

(*p*) *Shannon v. Bradstreet*, 1 Sch. & Lef. 66.

(*q*) *Doe v. Staple*, 2 T. R. 684; see *Barnes v. Crow*, 4 B. C. C. 10 & 11; *Doe v. Sybourn*, 7 T. R. 3; *Goodtitle v. Jones*, 7 T. R. 45, and following pages; *Doe v. Wroot*, 5 East, 138.

(*r*) *Doe v. Sybourn*, 7 T. R. 2; see *Doe v. Staple*, 2 T. R. 696; *Goodtitle v. Jones*, 7 T. R. 45, and following pages; *Roe v. Reade*, 8 T. R. 122.

(*s*) *Goodtitle v. Jones*, 7 T. R. 43; see *Doe v. Staple*, 2 T. R. 696. *Roe v. Reade*, 8 T. R. 122.

(*t*) *Annesley v. Simeon*, 4 Mad. 390; and see *Reade v. Sparkes*, 1 Moll. 11; *Jenkins v. Milford*, 1 J. & W. 635; *Ex parte Little*, 3 Moll. 67.

(*u*) See *Roe v. Reade*, 8 T. R. 122, 123.

(*v*) *Shine v. Gough*, 1 B. & B. 445.

(*w*) *Neave v. Avery*. 16 C. B. 328, and see *Smith v. Hayes*, 1 L. R. C. L. 333; *Clarke v. Reilly*, 2 I. R. C. L. 422.

a *feme covert* entitled to her separate use might protect himself by equitable plea against trespass by the husband, in whom the legal estate was vested (x).

36 & 37 Vict.
c. 66.

5. Now, generally, by 36 & 37 Vict. c. 66, s. 24, equitable defences are to be recognized in all the Courts, so that for the time to come the full merits, both at law and in equity, will be administered in the same action.

Leases by a
cestui que
trust.

6. As a tenant is not allowed to dispute his landlord's title, if a *cestui que trust*, having only an equitable estate, grant a lease, then, as between lessor and lessee, the lessor may distrain and exercise the other rights of a landlord in the same way as if at the date of the demise he had been the legal owner (y). The title of the lessor might be such, that on his death the person claiming under him could not prove the devolution of the estate without showing upon the pleadings that at the date of the lease the lessor's interest was equitable, and in such a case it is presumed the estoppel would not apply and the remedy would be in equity (z). But if there be no difficulty upon the plead-
[* 679] ings, the persons claiming under the * lessor, as, for instance his trustee in bankruptcy had always the same benefit of the rule as the lessor had (a).

Notice to
quit

7. If the trustees put the *cestui que trust* in possession, and the *cestui que trust* grants a lease and afterwards serves a notice on the lessee to quit, the *cestui que trust* is the agent of the trustees for the purposes of the notice, and an ejectment by the trustees can be sustained as if the notice had been given by themselves (b).

Injunction
between
tenants in
common.

8. If there be two *cestuis que trust* tenants in common, and one of them be put into possession, and cuts timber, and becomes insolvent, the other *cestui que trust* can obtain an injunction (c).

Possession of
the title
deeds.

9. The *title deeds* of an estate form no part of the usufructuary enjoyment; and therefore if a person vests an estate in trustees upon particular trusts, one of which is to receive the rents and pay them over to the settlor for life, and the deeds are *delivered into their possession*, they have a right to the custody of them for

(x) *Allen v. Walker*, 5 L. R. Ex. 187.

(y) *Alchorne v. Gomme*, 2 Bing. 54; *Blake v. Foster*, 8 T. R. 487; *Parker v. Manning*, 7 T. R. 537.

(z) See *Noke v. Awder, Co. Eliz.* 373, 436. See 2 Lord Raymond, 1553.

(a) *Parker v. Manning*, 7 T. R. 537.

(b) *Jones v. Phipps*, 3 L. R. Q. B. 567.

(c) *Smallman v. Onions*, 3 B. C. C. 621.

the benefit of all parties interested (*d*), and should the settlor obtain them from the trustees, and thereby be enabled to deal with the estate as absolute owner, the trustees, if it appeared they had acted fraudulently, or under such gross negligence as amounted to constructive fraud, would be held personally responsible for the consequences (*e*). However, a tenant for life, if the estate be *legal*, is entitled to the custody of the deeds (*f*), and may bring an action of detinue (*g*), or, unless he has shown that he cannot be safely trusted with the deeds (*h*), may take proceedings in equity for the recovery of them (*i*); and as equity follows law, the Court, in the absence of special trusts requiring the possession of the deeds by the trustees, will not take the deeds from the tenant for life who has got possession of them (*k*); and where the tenant for life in equity is *not the settlor*, and therefore cannot by suppressing the settlement make a title to the fee simple, has ordered the deeds to be delivered to the tenant for life * in equity (*l*), subject of course to the remainderman's right to production and inspection to a reasonable extent (*m*). Where the legal estate, whether of freeholds, copyholds, or leaseholds, is vested in a trustee or executor in trust, not for certain persons entitled in succession, but for *cestuis que trust* entitled

(*d*) See *Garner v. Hannington*, 22 Beav. 630; *Stanford v. Roberts*, 6 L. R. Ch. App. 307.

(*e*) See *Evans v. Bicknell*, 6 Ves. 174.

(*f*) In *Foster v. Crabb*, 12 C. B. 136, the Court seems to have approved the rule laid down in early times, that whoever first gets possession of the deeds, whether tenant for life or in remainder, keeps them. But see *Garner v. Hannington*, 22 Beav. 627; *Webb v. Webb*, 1 Eden, 8; *Duncombe v. Mayer*, 8 Ves. 320; [*Leathes v. Leathes*, 5 Ch. D. 221;] and *Sugd. Vend.* and P. 14th edit. p. 445, note (1).

(*g*) *Allwood v. Heywood*, 1 N. R. 289.

(*h*) See *Jenner v. Morris*, 1 L. R. Ch. App. 603.

(*i*) *Garner v. Hannington*, 22 Beav. 627.

(*k*) *Taylor v. Sparrow*, 4 Giff. 703, 9 Jur. N. S. 1226; and see *Denton v. Denton*, 7 Beav. 388.

(*l*) *Langdale v. Briggs*, 8 De G. M. & G. 391. In one case where deeds had been deposited in Court, and the tenant for life (whether legal or equitable is not clear) asked that the deeds might be delivered out to him, the Court refused, observing that "The Court never interfered as to the possession of deeds between a father, tenant for life, and a son entitled in remainder, but that in the case of a stranger tenant for life, the Court would interfere;" *Warren v. Rudall*, 1 J. & H. 1. But this, as observed by V. C. Stuart, was a mere *obiter dictum*; *Taylor v. Sparrow*, 9 Jur. N. S. 1227; [and has since been expressly disapproved of, *Leathes v. Leathes*, 5 Ch. D. 221.]

(*m*) *Davis v. Dysart*, 20 Beav. 405; *Pennell v. Dysart*, 25 Beav. 542.

absolutely in possession, the *cestuis que trust*, or if they are infants, their guardians, may institute proceedings to have the deeds delivered up to them. But as to *leaseholds*, an *executor* may hold the deeds until all debts have been paid and the personal estate cleared (n).

[The trustee in bankruptcy of the husband of a legal tenant for life (not entitled to the property as separate estate), has not an absolute right to the custody of the title deeds during the coverture; but where the circumstances require it they will be ordered to be brought into Court for safe custody (o).]

Cestuis que trust entitled to inspect documents.

10. *Cestuis que trust* have a right at all seasonable times to *inspect* the documents relating to the trust, and at their own expense to be furnished with *copies* of them, and the rule extends to *cases* submitted and *opinions of counsel* taken by the trustees for their guidance in the discharge of their duty, for as the expense falls upon the trust estate, it stands to reason that the *cestuis que trust* may see the opinions and cases for which they pay. But the right does not arise until the relation of trustee and *cestui que trust* has been established to the satisfaction of the Court (p).

Custody of deeds may be committed to one of the trustees.

11. As the deeds and documents relating to the trust [* 681] cannot be * held by *all* the trustees (unless they be deposited with bankers with a direction not to part with them except on the authority of the whole number), co-trustees have been held to be justified in committing the custody of the deeds to one of themselves; and where the deeds are a security for money, the possession by the one is no implied authority from the co-trustee to him who holds them to receive the principal money secured (q).

(n) *Smith v. Pavier*, V. C. Wood, 18 July, 1852. In this case J. Smith devised freeholds and leaseholds for long terms to Wade and Pavier and their heirs to the use of Joel Smith for life with remainder to Wade and Pavier to preserve contingent remainders, with remainder to the children of Joel Smith (who were infants at the filing of the bill) and the heirs of their bodies, with remainders over, including limitations to Wade and Pavier to preserve contingent remainders, who were also executors. Wade and Pavier took possession of the title deeds on the testator's death, and held them during the life of Joel Smith. On his death the infant children by their next friend, with two other persons as co-plaintiffs (being their guardians appointed by the Court) filed their bill against Pavier the surviving executor for delivery of the deeds, and there being no allegation of unpaid debts, the delivery of the deeds to the two guardians was ordered.

[(o) *Ex parte Rogers*, 26 Ch. D. 31.]

(p) *Wynne v. Humbertson*, 27 Beav. 421.

(q) *Cottam v. Eastern Counties Railway Company*, 1 J. & H. 243; *Goldney v. Bower*, cited *Ib.* 247.

12. Upon the principle that the *cestui que trust* is *Privileges of foro conscientie* entitled to the pertainancy of the profits, *cestui que trust* he has been invested by the express language of some statutes, and by the equitable construction of others, with the various privileges conferred by the legislature upon the legal tenants of real estate.

13. By 6th Geo. 4, c. 50, s. 1. Every man between the ages of 21 and 60, residing in any county in Eng- *Qualification of cestui que trust to be a juror.* land, who shall have in his own name or *in trust for him* within the same county 10*l.* by the year, above re- prises, in real estate, &c., &c., is qualified to serve as a *juror* (r).

14. The election of *coroner* is a right vested in the *freeholders* of the county; and the privilege of voting *As to right of cestui que trust to vote for a coroner.* must, it is conceived, have belonged originally to the *legal* freeholder. However, by 58th Geo. 3, c. 95, s. 2, it was enacted that no person should be allowed to have any vote for or by reason of any trust estate or mortgage unless such trustee or mortgagee should be in actual possession or receipt of the rents and profits, but that the *cestui que trust* or mortgagor in possession should vote for the same estate. Upon the repeal of 58 Geo. 3, c. 95, by the late Coroner's Act (s), the provision referred to was not re-enacted, and the consequence is that an *equitable owner* has now no right to vote (t).

15. By the Game Act, 22 & 23 Car. 2, c. 25, s. 3, persons were disqualified from sporting unless they had *lands and tenements*, &c., of the clear value of 100*l.* *per annum*; and it was decided that a *cestui que trust* of lands to that amount was within the intention of the Act. Lord Mansfield observing, that "the privilege was given to *property*, and the *cestui que trust* was *substantially* the owner and the trustees only *nominal-ly*" (u). By the provisions of the late Game Act no qualification is now necessary (v). *Right of cestui que trust to sport under the old law.*

16. By 6th Vic. c. 18, s. 74, "no trustee of lands or tenements shall in any case have a right to vote in any such election, * (*i. e.* for a Member of Parlia- [* 682] ment) for or by reason of any trust estate therein, but the *cestui que trust* in actual possession, or in the receipt of the rents and profits thereof, though he may receive the same through the hands of the trustee, *Right of cestui que trust to vote at elections for members of Parlia-ment.*

(r) And see Co. Litt. 272 a, 272 b.

(s) 7 & 8 Vict. c. 92.

(t) Regina v. Day, 3 Ell. & Bl. 859.

(u) Wetherell v. Hall, Cald. 230.

(v) 1 & 2 W. 4, c. 32.

shall and may vote for the same notwithstanding such trust" (*w*).

[Protector of the settlement.]

[17. The person entitled to the beneficial enjoyment of the rents and profits of the settled property, under a settlement made *since* the Fines and Recoveries Act, is the protector of the settlement under section 22 of the Act, as *owner* of the prior estate, and not the trustees in whom the legal estate is vested; and in a settlement made *before* the Act, if the estates are equitable the beneficial owner is also protector (*x*).

Income and corpus distinguished.

18. The question frequently arises both in construing Acts of Parliament which speak of a limited amount of *income* and also in determining the relative rights of *tenants for life and remaindermen*, what is *income* and what is *corpus*, and it has been held that the tenant for life of a manor is entitled to the fines payable on all customary grants (*y*), or on admission (*z*), and where leaseholds are annually renewable, the tenant for life of the reversion is entitled to the annual fines for renewal (*a*); [and where leaseholds for lives are perpetually renewable on the dropping of the lives, the tenant for life of the reversion is entitled to the heriots and fines for renewal, as they are of the nature of casual profits accruing during his tenancy for life (*b*).] So a tenant for life is entitled to underwood and thinnings of plantations in ordinary course (*c*), and to rents and royalties payable under the lease of an open mine (*d*), or of a brickfield, whether the lease was granted by the testator or by the trustees of his will under a power in the will (*e*), and to the produce of gravel, loam, peat, or bog-earth got annually according to the usual custom (*f*). But a tenant for life is not entitled to trees in woodlands not cut periodically according to custom, though cut for the sake of improving the growth of the rest (*g*).

Mines and timber.]

[19. Under the Settled Land Act, 1882, a tenant for [* 683] life, whether *impeachable for waste or not,

(*w*) See *Wallis v. Birks*, 5 L. R. C. P. 222 and see *ante* p. 235.

(*x*) *Re Dudson's Contract*, 8 Ch. D. 628; *Re Ainslie*, 51 L. T. N. S. 780; and see *ante* p. 382.]

(*y*) *Earl Cowley v. Wellesley*, 35 Beav. 640.

(*z*) S. C. 35 Beav. 641.

(*a*) *Milles v. Milles*, 6 Ves. 761.

(*b*) *Brigstocke v. Brigstocke*, 8 Ch. D. 357.]

(*c*) *Earl Cowley v. Wellesley*, 35 Beav. 635.

(*d*) S. C. 35 Beav. 639.

(*e*) S. C. 35 Beav. 638.

(*f*) S. C. 35 Beav. 639.

(*g*) S. C. 35 Beav. 635.

can now grant mining leases of mines either opened or unopened and is entitled if impeachable for waste to one-fourth part of the rents, and if not impeachable for waste to three-fourth parts of the rents (*h*). And as a tenant for life although impeachable for waste has a right to continue the working of open mines, he will be entitled, if a lease is granted of such mines under the powers of the Act, to three-fourths of the rents. Under the same Act a tenant for life impeachable for waste, may on obtaining the consent of the trustees of the settlement or an order of the Court, cut and sell timber, ripe and fit for cutting, and is entitled to one-fourth part of the net proceeds but the remaining three-fourths are to go as capital (*i*).

20. If a business be held in trust for successive tenants for life, and remaindermen, and be carried on at a loss during the life of the first tenant for life, the loss must be made good out of the profits earned during the life of the next tenant for life and not out of the corpus (*k*).] Unless a contrary intention appears in the instrument creating the trust; *Re Millichamp*, 52 L. T. N. S. 758. [Loss on business held in trust for persons successively.]

21. The tenant for life of an estate must bear the expense of accounts necessary to be taken for the discharge of the *succession duty* payable by the tenant for life as successor (*l*), and must discharge the rates and taxes payable during his life (*m*). Succession duty.

22. The expense of *fencing* newly acquired enclosures will fall upon the corpus (*n*). Fencing.

23. Hitherto we have spoken of the *cestui que trust's* right to the pernancy of the profits in respect of lands. In trusts of *chattels personal*, as where heirlooms are vested in a trustee upon trust for the persons successively entitled under the limitations of a strict settlement, the *cestui que trust* for the time being is equally entitled to the use and possession of the goods during the continuance of his interest; and upon the ground of this right the goods are not forfeited on the bankruptcy of the tenant for life, though left in the possession of the trustee. *Cestui que trust's* possession of chattels.

[(*h*) Sects 6, 11.]

[(*i*) Sect. 35.]

[(*k*) *Upton v. Brown*, 26 Ch. D. 588; but see *Gow v. Forster*, 26 Ch. D. 672, the decision in which seems to have turned on the wording of the will and not on any general principle.]

(*l*) *Earl Cowley v. Wellesley*, 35 Beav. 642.

(*m*) *Fountaine v. Pellet*. 1 Ves. jun. 337. see 342.

(*n*) *Earl Cowley v. Wellesley*, 35 Beav. 641.

* 22 LAW OF TRUSTS.

sion of the bankrupt by permission of the legal owner, for they are left with him *according to the title* (o).

Household
goods.

24. In a bequest to a person of the use of *household goods*, it seems the legatee may use them in his own or in any other person's house, and either alone or pro- [* 684] miscuously with other goods, or, it is * said, may let them out to hire (p)¹; but, where the chattels are *heirlooms annexed to a house*, and their continuance in the mansion is evidently a constituent part of the trust, they cannot be let to hire except together with the house itself (q). Of course the use of the chattels by the tenant for life does not enable him to *pawn* them beyond the extent of his own interest (r).

[Heirlooms.]

[25. By the Settled Land Act, 1882, s. 37, a tenant for life may sell personal chattels settled as *heirlooms*, and the money arising by the sale is to be capital money under the Act, and to be dealt with accordingly, or it may be invested in the purchase of other chattels to be settled and held on the same trusts. But no sale or purchase of chattels under the section is to be made without an order of the Court (s).]

Stock in the
funds.

26. Where the trust fund consists of *stock*, the *cestui que trust* is usually put in possession of the dividends by a *power of attorney* from the trustee to the *cestui que trust's* bankers, with a written authority from the trustee to the bankers to credit the *cestui que trust* with the dividends as and when received, by which arrangement the trustee is spared the trouble of repeated personal attendances at the Bank of England, and the entries in the books of the private bankers are sufficient evidence of the receipt. In cases where the *cestui que trust* is *tenant for life*, this course seems free from objection; but where his interest is one which may *determine in his lifetime*, some risk is incurred of the power

(o) See *supra*, p. 243.

(p) *Marshall v. Blew*, 2 Atk. 217.

(q) *Cadogan v. Kennett*, Cowp. 432; [and see *Re Brown's Will*, 27 Ch. D. 179.]

(r) *Hoare v. Parker*, 2 T. R. 376.

(s) As to this section see *ante*, p. 566.]

¹ Before the trustee surrenders the possession of such chattels to a *cestui que trust* who is only-life tenant, it is his duty to take from the latter a schedule of the articles delivered signed by him; *Langworthy v. Chadwick*, 13 Conn. 42; *Vance v. Coxe*, 16 Ala. 123; *Westcott v. Cody*, 5 Johns. Ch. 334. And if there be danger that the *cestui que trust* will waste or carry the articles away, the trustee or remainderman may insist on his giving satisfactory security for their safety; *Woodman v. Good*, 6 Watts & S. 169; *Covenhoven v. Shuler*, 2 Paige, 122; *Frazer v. Boville*, 11 Gratt. 9; *Holliday v. Coleman*, 2 Munf. 162.

of attorney and authority being acted upon by the bankers after the determination of the *cestui que trust's* estate; and it is conceived that the trustee would be liable to the other *cestuis que trust* for any misappropriation thus taking place. The trustee must be careful to see that the power of attorney extends only to the receipt of the *dividends*, and not to the *sale of the stock* itself; otherwise, if the bankers sell out the stock and the proceeds are misapplied, the trustee will be answerable (*t*).

Secondly. Of the jus disponendi.

1. The *cestui que trust* may call upon the trustee to execute conveyances of the legal estate as the *cestui que trust* directs (*u*).¹ If the trustee refuse to comply, and the *cestui que trust* institutes proceedings to compel him, the trustee will be visited with the * costs (*v*), unless there was some reasonable [* 685] ground for his refusal (*w*),² or he acted *bonâ fide* under the advice of counsel (*x*); and the trustee has been made to pay costs, though the *cestui que trust*, instead of filing a *bill*, might have enforced a conveyance by the summary process of a *petition* (*y*). But a trustee has a right to be satisfied by the fullest evidence that the party requiring the conveyance is the exclusive *cestui que trust* (*z*)³; and a *cestui que trust* cannot call for the conveyance of a larger legal estate than he has equitable: an equitable tenant in *tail*, for instance, cannot call for a conveyance of the legal *fee-simple* (*a*).

Cestui que trust's right of disposition of the legal estate.

(*t*) See *Sadler v. Lea*, 6 Beav. 324.

(*u*) *Payne v. Barker*, Sir G. Bridgm. Rep. 24.

(*v*) *Jones v. Lewis*, 1 Cox, 199; *Willis v. Hiscox*, 4 M. & Cr. 197; *Thorby v. Yeats*, 1 Y. & C. C. C. 438; *Penfold v. Bouch*, 4 Hare, 271; *Firmin v. Pulham*, 2 De G. & Sm. 99; *Palairret v. Carew*, 32 Beav. 565; and see *Campbell v. Home*, 1 Y. & C. C. C. 664.

(*w*) *Goodson v. Ellisson*, 3 Russ. 583; *Poole v. Pass*, 1 Beav. 600.

(*x*) *Angier v. Stannard*, 3 M. & K. 556; and see *Devey v. Thornton*, 9 Hare, 232; *Field v. Donoughmore*, 1 Dru. & War. 234; [*Stott v. Milne*, 25 Ch. D. 710.]

(*y*) *Watts v. Turner*, 1 R. & M. 634.

(*z*) *Holford v. Phipps*, 3 Beav. 434, and see *Etchells v. Williamson*, W. N. 1869, p. 61.

(*a*) *Saunders v. Neville*, 2 Vern. 428. But though this point may have been mooted in the case and ruled as reported, yet the principal question in the cause was a different one, viz., whether under the circumstances the plaintiff was entitled to call for a

¹ *Robler v. Clark*, 25 Cal. 317.

² *Boskerck v. Herrick*, 65 Barb. 250.

³ *Armstrong v. Zane*, 12 Ohio, 287; *Dustan v. Dustan*, 1 Paige,

And Lord Eldon was of opinion that a *cestui que trust* could not require the trustee to divest himself from time to time of *different parcels* of the trust estate; for the trustee had a right to say, "If you mean to divest me of my trust, divest me of it altogether, and then make your conveyances as you think proper" (b). And a trustee, like a mortgagee, cannot be called upon to convey the estate by any other words or description than that by which the conveyance was made to himself (c). And a trustee cannot be compelled to execute a conveyance containing inaccurate recitals; but where all the *cestuis que trust* are parties, he cannot insist on the insertion of recitals against the wishes of his *cestuis que trust* (d); and a trustee in whom any property is vested which is liable to *succession duty*, must see that the duty is satisfied or he becomes personally liable (e).

Succession
duty.

[Under the
Settled Land
Act.]

[2. Where property is disposed of by the beneficial owner under the provisions of the Settled Land Act, 1882, as by the 20th section he is empowered to convey the property for the estate, or interest the subject of the settlement, and can therefore pass the legal [* 686] * estate, if comprised in the settlement, without the concurrence of the trustees, it is conceived that the trustees would not be compelled to join in the assurance.]

Trustee for
separate use.

3. A trustee for the *separate use* of a married woman with *restraint of anticipation*, holds upon a special trust during the coverture; but if the husband die, the trust for the separate use is suspended and the *feme* has an absolute power of disposition, though on a future coverture the separate use and non-anticipation clause, if not prevented by previous disposition, would revive. The Trustee, therefore, after the death of the husband, holds upon a simple trust for the *feme*, and is bound at her direction to convey the legal estate to her (f).

Fraudulent
appoint-
ments.

4. It not unfrequently happens that when property is held upon trust for a tenant for life, with a power of

conveyance of the legal estate even to him, and "the heirs of his body." See note by Raithby, correcting the text from the Reg. Book.

(b) *Goodson v. Ellisson*, 3 Russ. 594. But if the *cestuis que trust* of a fund, as tenant for life and remainderman, assign part of the fund, it is conceived that the trustee cannot refuse to transfer that part to the assignee. The owner of an aliquot share has a separate claim in respect of it: *Smith v. Snow*, 3 Mad. 10.

(c) *Goodson v. Ellisson*, *ubi supra*.

(d) *Hartley v. Burton*, 3 L. R. Ch. App. 365.

(e) 16 & 17 Vict. c. 51, s. 44.

(f) *Buttanshaw v. Martin*, Johns. 89.

appointment among his children, and in default of appointment for the children, the trustee is called upon to make a conveyance by the joint direction of the parent and such of the children as are the appointees, and the trustee has a shrewd suspicion that *undue influence* has been used, or that an *underhand bargain* in derogation of the rights of the other children, who take nothing by the appointment. In these cases, if the nature of the transaction be such as to show on the face of it that there is good ground for suspicion, the trustee will, on refusing to convey, be protected by the Court, and be entitled to his costs (g). But, although it may be the duty of the trustee to make enquiry as to the *bona fides* of the transaction, yet, if he cannot prove any *mala fides*, the mere *possibility* of fraud or undue influence will not be sufficient, and if a trustee decline to convey without any better reason, he will have to bear the costs of a suit for compelling him, though he will still be entitled to his charges and expenses properly incurred not being costs in the cause (h).

5. Trustees who are bound to make a conveyance of their trust estate, cannot justify their refusal to convey by alleging a duty to *enquire into another trust* recited in their trust deed, but which is wholly distinct from the trust in question (i). Enquiry into a collateral trust.

6. Where the legal estate is vested in trustees for A. for life, with remainder to B., and on the death of A. application for a conveyance is made by B., the trustees sometimes object that they cannot convey until they have recovered all the *arrears of rent* that accrued in the lifetime of A. (k). In such a case the trustees are, * at all events, bound to use due diligence, and [* 687] must not from their *laches* postpone the rights of the remainderman. But the better course would be to give the trustees an *indemnity* on delivery of possession, or an *undertaking* to receive the arrears and account for them to the tenant for life's estate. Delivery of possession to remainderman.

7. The 4th section of 8 & 9 Vict. c. 106, enacts that

(g) *Hannah v. Hodgson*, 30 Beav. 19; *King v. King*, 1 De G. & J. 663.

(h) *Firmin v. Pulham*, 2 De G. & Sm. 99; *Campbell v. Home*, 1 Y. & C. C. C. 664.

(i) *Palairot v. Carew*, 32 Beav. 564.

(k) See Bacon's Abridg. "Distress." This claim was made by the trustees in *Hogg v. Jones*, reported upon another point, 32 Beav. 45, and M.R. ordered delivery of possession to the remainderman, on his undertaking in effect to use due diligence in receiving the arrears and handing them over.

Trustee's
conveyance.

the word "*grant*" shall not imply any covenant in law except so far as the same may, by force of any Act of Parliament, imply a covenant; and therefore, whatever may have been the case formerly, a conveying trustee cannot now draw any liability upon himself by the use of the word *grant alone*. But, as to lands in *Yorkshire*, it must be remembered that the *Yorkshire Registry Acts* (*l*) gave the force of covenants for title to the combined words "*grant, bargain, and sell*." And by the *Lands Clauses Consolidation Act*, the word "*grant*" in conveyances by *companies* within the provision of the Act is made to carry with it the ordinary covenants for title (*m*).

[By the *Conveyancing and Law of Property Act*, 1881, the use of the word "*grant*" is rendered unnecessary for the conveyance of hereditaments, corporeal or incorporeal, whether in instruments before or after the commencement of the Act (*n*).]

Trustee to
bar dower.

8. Before the abolition of tortious conveyances, a trustee to bar dower was or was not called upon to join in a conveyance, according to the circumstances of the case. Where a power of appointment was exercised besides the ordinary conveyance, his joining was dispensed with; but where, no power being exercised, the whole fee could not be passed without his concurrence, he was made a party (*o*). In a recent case, it was held by V. C. Stuart that a purchaser was still entitled to call for the concurrence of the trustee to bar dower, where the deed creating the uses to bar dower was dated before 8 & 9 Vict. c. 106, s. 4, so that a forfeiture might by possibility have occurred. The Vice Chancellor, however, considered that the objection taken by the purchaser to the title, which was founded on the non-concurrence of the dower trustee, who was absent in Australia, was frivolous and vexatious, and had an extremely slight foundation, and on that account refused to give the purchaser any costs (*p*). On appeal, [* 688] the Lord Chancellor * and L. J. Knight Bruce seem to have considered the objection altogether untenable, though they did not distinctly decide the point (*q*). The practical result is, that for the future a purchaser cannot be advised to require the concurrence of the trustee to bar dower.

(*l*) 6 Anne, c. 35, ss. 30, 34; 8 G. 2 c. 6, s. 35. [Repealed as from the 1st January, 1885, by 47 & 48 Vict. c. 54.]

(*m*) 8 & 9 Vict. c. 18, s. 132.

[(*n*) 44 & 45 Vict. c. 41, s. 49.]

(*o*) See Sug. Pow. 8th Ed. p. 193, *et seq.*

(*p*) *Collard v. Roe*, 4 Jur. N. S. 431.

(*q*) *Ib.* 4 De G. & J. 525.

9. In general there are *no intermediate steps* of the *equitable interest*, so that if A. be trustee for B., who is trustee for C., A. holds in trust for C., and must convey the estate as C. directs (*r*). But if any special confidence or discretionary power be reposed in B., which requires him to have the legal estate, he may then call upon the original trustee to execute a transfer to himself (*s*). And if a fund be vested in trustees in trust for a *feme covert* for life for her separate use, with remainder upon such trusts as she may by will appoint, and she by will gives legacies, and disposes of the residue and appoints executors, the original trustees are bound to transfer the fund to the executors to be administered by them (*t*); [and where the original trustees, instead of transferring the fund to the executors, paid it into Court under the Trustee Relief Act; they were made to pay the costs of the petition for getting the fund out of Court (*u*). But if the donee of a *special* power of appointment appoint the fund to trustees in trust for the objects of the power, the trustees so nominated cannot call for a transfer of the fund (*v*).]

A series of equitable interests.

10. Where trustees hold a fund *upon such trusts* as a person by an instrument to be executed in a particular manner may *appoint*, they must of course be careful in transferring it to the appointees to see that all the formalities attending the power have been duly observed, for if the execution of it be not regular, the trustees (except in those cases where Courts of equity aid a defective execution) will be personally liable for the fund to the parties claiming in default of the execution of the power (*w*).

Trustees for appointees.

11. The *costs* incurred by the trustee in relation to the conveyance must be paid by the *cestui que trust*, or, which is the same thing, must be discharged out of the trust estate.

Costs.

(*r*) *Head v. Lord Teynham*, 1 Cox, 57; and see — *v. Walford*, 4 Russ. 372.

(*s*) *Wetherell v. Wilson*, 1 Keen, 86; *Cooper v. Thornton*, 3 B. C. C. 96, 186; *Woods v. Woods*, 1 M. & Cr. 409; *Angier v. Stannard*, 3 M. & K. 571; *Onslow v. Wallis*, 16 Sim. 483, 1 Mac. & G. 506; — *v. Walford*, 4 Russ. 372; *Poole v. Pass*, 1 Beav. 600.

(*t*) *Re Philbrick's Trust*, 13 W. R. 570; and see *Hayes v. Oatley*, 14 L. R. Eq. 1.

[(*u*) *Re Hoskin's Trusts*, 5 Ch. D. 229, 6 Ch. D. 281; but see as to this case *Turner v. Hancock*, 20 Ch. D. 303.]

[(*v*) *Busk v. Aldam*, 19 L. R. Eq. 16.] But see *Scotney v. Lomer*, 29 Ch. D. 535, where North, J., was of the opposite opinion.

(*w*) *Hopkins v. Myall*, 2 R. & M. 86; *Cocker v. Quayle*, 1 R. & M. 535; *Reid v. Thompson*, 2 Ir. Ch. Rep. 26.

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* SECTION II.

OF THE CESTUI QUE TRUST'S ESTATE IN THE SPECIAL TRUST.

Cestui que trust's estate in special trust.

1. THIS may be said to be, The right to enforce in equity the specific execution of the settlor's intention to the extent of that *cestui que trust's* particular interest. The other parties entitled may express a desire that the trust should be differently administered; but if such a divergence from the donor's will would prejudice or injuriously affect the rights of any one *cestui que trust*, that *cestui que trust* may compel the trustees to adhere strictly and literally to the line of duty prescribed to them (x).

Special trust may be converted into a simple trust.

2. If there be only one *cestui que trust*, or there be several *cestuis que trust*, and all of *one mind* (in each case *sui juris*), the specific execution may be stayed, and the *special* trust will then acquire the character of a *simple* trust; for whatever modifications of the estate the settlor may have contemplated, through whatever channel he may have originally intended his bounty to flow, the *cestuis que trust*, as the persons to be eventually benefited, are in equity, from the creation of the trust, and before the trustees have acted in the execution of it, the absolute beneficial proprietors. Thus if a fund be given to trustees upon trust to accumulate until A attains *twenty-four*, and then to transfer the gross amount to him, A., on attaining *twenty-one*, may, as the person exclusively interested, call for the immediate payment (y). So if real estate be devised with a direction that the devisees are not to have the enjoyment until they attain the age of *twenty-five years*, unless there be a clear indication of an intention on the part of the testator, not only that his devisees are not to have the enjoyment of the property until the age mentioned, but that some other person is to have the enjoyment—or unless the property is so clearly taken away from the devisees up to the time of their attaining *twenty-five* as to induce the Court to hold that, as to the previous rents and profits, there has been an intestacy—the Court does not hesitate to strike out of the will the direction as to non-enjoyment, and gives the property at once to the devisees

(x) See *Deeth v. Hale*, 2 Moll. 317.

(y) *Josselyn v. Josselyn*, 9 Sim. 63; *Saunders v. Vautier*, 4 Beav. 115; Cr. & Ph. 240; and see *Curtis v. Lukin*, 5 Beav. 147; *Rocke v. Rocke*, 9 Beav. 66; *Magrath v. Morehead*, 12 L. R. Eq. 491.

as the absolute owners (z). So if a legacy * be [* 690] bequeathed to trustees upon trust to purchase an *annuity*, the intended annuitant, if *sui juris*, may claim the legacy without going through the form of investment (a); and if a fund be vested in trustees in trust for the *personal* support, clothing, and maintenance of A., an adult, A. is exclusively entitled to the benefit of the fund, and if he become bankrupt, it passes to his trustee in bankruptcy (b).

3. To illustrate this subject further, where a convey- Pearson v. Lane.
ance had been made to trustees upon trust to sell, and with the proceeds to purchase other lands to be settled on the daughters of W. J. as tenants in common in tail, with remainder to them in fee, and the daughters levied a fine of the *lands to be sold* to the uses and upon the trusts of their respective marriage settlements, the question was, whether the entail had been effectually barred; and Sir W. Grant said, "In the lands to be sold they (the daughters) had no interest, legal or equitable, *expressly* limited to them: but the equitable interest in those lands must have resided somewhere: the trustees themselves could not be the beneficial owners; and if they were mere trustees, there must have been some *cestuis que trust*. In order to ascertain *who* they are, a Court of equity enquires for whose benefit the trust was created, and determines that those who are the objects of the trust have the interest in the thing which is the subject of it. Where money is given to be laid out in land, to be conveyed to A., though there is no gift of the money to him, yet in equity it is his, and he may elect not to have it laid out: so, on the other hand, where land is given upon trust to sell, and pay the produce to A., though no interest in the land is expressly given to him, in equity he is the owner, and the trustee must convey as he shall direct: *if there are also other purposes for which it is sold, still he is entitled to the surplus of the price, as the equitable owner subject to those purposes; and if he provide for them he may keep the estate unsold.* The daughters by electing to keep this estate have acquired the fee, and it was discharged of every trust to which it had been subject" (c).

4. But *until the cestui que trust* or the joint *cestuis que trust* countermand the specific execution, the special proceeds till

(z) Gosling v. Gosling, Johns. 265.

(a) Dawson v. Hearn, 1 R. & M. 606, and cases there cited; *Re Browne's Will*, 27 Beav. 324.

(b) *Youngehusband v. Gisborne*, 1 Coll. 400.

(c) *Pearson v. Lane*, 17 Ves. 101.

counter-
manded by
the *cestui que*
trust.

trust will proceed; as if lands be devised to trustees upon trust to sell, and pay the proceeds to A., the property will remain personal estate in A. until * he discharge the character impressed upon it by electing to take it as land (d).

Accounts.

5. As an incident to the beneficial enjoyment by the *cestui que trust* of his interest, he has a right to call upon the trustee for accurate *information* as to the state of the trust (e). Thus, in a trust for sale and payment of debts, the party entitled subject to the trust may say to the trustee, What estates have you sold? What is the amount of the monies raised? What debts have been paid? &c. (f). It is therefore the bounden duty of the trustee to keep clear and distinct *accounts* of the property he administers, and he exposes himself to great risks by the omission (g). It is the *first duty*, observed Sir T. Plumer, of an accounting party, whether an agent, a trustee, a receiver, or an executor (for in this respect they all stand in the same situation), to be *constantly ready with his accounts* (h).

Sanction of
co-trustee's
accounts.

6. Not only is a trustee bound to render accurate accounts, but if he stand by and sanction the rendering of *improper accounts* by a defaulting trustee, he becomes liable himself for the misrepresentation (i).

Legatee.

7. A *legatee*, as being a quasi *cestui que trust*, is entitled to have a satisfactory explanation of the state of the testator's *assets* and an inspection of the *accounts*, but not to require a copy of the accounts at the expense of the estate (k).

(d) See *Walter v. Maunde*, 19 Ves. 429.

(e) *Springett v. Dashwood*, 2 Giff. 521; *Walker v. Symonds*, 3 Sw. 58, *per* Lord Eldon; *Newton v. Askew*, 11 Beav. 152; *Gray v. Haig*, 20 Beav. 219; *Burrows v. Walls*, 5 De G. M. & G. 253.

(f) *Clarke v. Ormonde*, Jac. 120 *per* Lord Eldon.

(g) *Freeman v. Fairlie*, 3 Mer. 43 *per* Lord Eldon.

(h) *Pearse v. Green*, 1 J. & W. 140; and see *Hardwicke v. Vernon*, 14 Ves. 510; *White v. Lincoln*, 8 Ves. 363; *Turner v. Corney*, 5 Beav. 515; *Anon.* 4 Mad. 273; *Jefferys v. Marshall*, 23 L. T. N. S. 548; 19 W. R. 94; *Underwood v. Trower*, W. N. 1867, p. 83. As to the costs of suits arising out of a refusal to render accounts, see *Springett v. Dashwood*, 2 Giff. 521, and the cases there cited; *Kemp v. Burn*, 4 Giff. 348; *Wroe v. Seed*, 4 Giff. 425; *Payne v. Evens*, 18 L. R. Eq. 356; *Heugh v. Scard*, 33 L. T. N. S. 659; 24 W. R. 51; and *Jeffreys v. Marshall*, *ubi supra*. In taking accounts against the trustee after a long lapse of time, the Court will show every indulgence it can to the trustee for enabling him to clear his accounts, *Banks v. Cartwright*, 15 W. R. 417.

(i) *Horton v. Brocklehurst* (No. 2), 29 Beav. 504.

(k) *Ottley v. Gilby*, 8 Beav. 602.

PROPERTIES OF THE CESTUI QUE TRUST'S ESTATE.

WE shall next enter upon the properties of the *cestui que trust's* estate as effected by the acts of the *cestui que trust*, or by operation of law.

SECTION 1.

OF ASSIGNMENT.

UNDER this head we shall treat : *First*. Of the assignable quality of an equitable interest ; *Secondly*. Of the rule that the assignee of an equity is bound by all the equities affecting it ; *Thirdly*. Of Notice ; and, *Fourthly*. Of the rule *Qui prior est tempore potior est jure*.

First. Of the assignable quality of an equitable interest.

1. It may be laid down as a general rule that an equitable interest may be assigned, though it be a mere possibility (l)¹, and that either with or without the intervention of the trustee (m). And the assignee of the *cestui que trust* may call upon the trustee to clothe the equitable interest with the legal estate, and on his refusal may by suit compel a conveyance without making the assignor a party (n). But a mere right to sue a trustee for an alleged breach of trust, and which right is not annexed to any transfer of the trust estate or any part thereof, is not assignable, or at least will not pass by a deed for 5s. consideration so as to enable the nominal purchaser to sue in respect of it (o).

(l) *Courthorpe v. Heyman*, Cart. 25; *Warmstréy v. Tanfield*, 1 Ch. Rep. 29; *Goring v. Bickerstaff*, 1 Ch. Ca. 8; *Cornbury v. Middleton*, Ib. 211, per Judges Wyld and Rainsford; *Burgess v. Wheate*, 1 Eden, 195, per Sir T. Clarke; 21 Vin. Ab. 516, pl. 1; *Smith v. Grant*, W. N. 1874, pp. 78, 120.

(m) *Phillips v. Brydges*, 3 Ves. 127, per Lord Alvanley.

(n) *Goodson v. Ellisson*, 3 Russ. 583; *Jones v. Farrell*, 1 De G. & J. 208.

(o) *Hill v. Boyle*, 4 L. R. Eq. 260.

¹ *Sparhawk v. Cloon*, 125 Mass. 262.

Restraint of
alienation.

[* 693] * 2. A restriction *against alienation* (except in the case of a married woman) will have no more effect in equitable than in legal interests, but will be rejected as contravening the policy of the law (*p*),¹ but in a limitation to the separate use of a *feme covert*, in order to give full effect to the estate itself, a clause against anticipation *during the coverture* is allowed (*q*).

Equitable
interest in
land.

3. As to *lands*, the transfer of an equitable interest might before the Statute of Frauds have been made by parol, but now by the 9th section of the Act all grants and assignments of any trust or confidence are required to be in *writing signed by the party granting or assigning the same*, or else are utterly void. A writing, therefore, is all that is necessary, but it is the practice to employ the same species of instrument, and the same form of words in the transfer of equitable as of legal estates.

8 & 9 Vict. c.
106.

4. A recent statute (*r*) enacts that an assignment of a chattel interest in lands not being copyhold shall be void *at law* unless made by *deed*, but it is conceived that this enactment effects *legal* interests only, and that the legislature cannot have intended to require a more solemn instrument for the assignment of an equitable chattel interest than for the conveyance of the equitable fee.

Equitable
entail.

5. The power of an equitable *tenant in tail* to dispose of the equitable fee simple has been differently viewed at different periods. At common law all inheritable estates were in fee simple, and it was the statute *de donis* (*s*) that first gave rise to entails and expectant remainders. As this statute was long prior to the introduction of uses, had equity followed the analogy of the common law only, a trust limited to A. and the heirs of his body, and in default of issue to B. would have been construed a fee simple conditional and the remainder over would have been void; but the known legal estates of the day, whether parcel of the common law or ingrafted by statute, were copied without distinction into the system of trusts, and, equitable entails indisputably existing, the question in constant dispute was, by what process they were to be barred. After

(*p*) *Snowdon v. Dale*, 6 Sim. 524; *Green v. Spicer*, 1 R. & M. 395; *Graves v. Dolphin*, 1 Sim. 66; *Brandon v. Robinson*, 18 Ves. 429; *Rochford v. Hackman*, 9 Hare, 480.

(*q*) See *infra*, chap. xxvii., s. 6.

(*r*) 8 & 9 Vict. c. 106, s. 3.

(*s*) 13 Ed. 1 st. 1, c. 1.

¹ *Blackstone Bank v. Davis*, 21 Pick. 43; *Daniels v. Eldredge*, 125 Mass. 350.

much fluctuation (*t*), it was finally established by Lord Hardwicke, that as entails with expectant remainders had gained a footing in trusts by analogy to the statute *de donis*, a Court of equity was bound to follow the analogy throughout, and therefore that a tenant in tail of a trust could not bar his issue, or the * re- [* 694] mainderman, except by an assurance analogous to one, which would have been a bar had the entail been of the legal estate.

6. The doctrines of equity, as finally settled upon this principle, were as follows:—

Summary of
the law be-
fore the late
Fines and
Recoveries
Act.

a. For a good *equitable recovery* there must have been an *equitable tenant to the præcipe*, that is the beneficial owner (*u*) of the first equitable freehold must necessarily have concurred (*v*).

β. An equitable recovery was a bar to *equitable* only and not to *legal* remainders (*w*).

γ. An equitable recovery was not vitiated by the circumstances that the *equitable tenant to the præcipe* had also the *legal freehold* (*x*).

δ. An *equitable remainder* was well barred, though it was vested in a person who *who had also the legal fee* (*y*).

7. At the present day, by the operation of the Fines and Recoveries Act (*z*), the *equitable tenant in tail* may dispose of the equitable fee by the same modes of assurance and with the same formalities as if he were tenant in tail of the *legal estate*.

Fines and
Recoveries
Act.

8. A deed to bar the entail of an equitable interest in *copyholds* must, though not so *expressly* enacted, be entered on the court rolls *within six calendar months* from the date thereof (*a*).

Inrolment
of disentail-
ing deed of
copyholds.

9. An estate *estate pur autre vie* was not even at law within the statute *de donis*; but a *quasi* entail (an estate of a most anomalous character) was introduced into legal estates, and was thence imported into trusts. The present doctrine of the Court appears to be this.

Estates *pur
autre vie*.

(*t*) See an account of the fluctuation in 3rd edit. p. 601–604.

(*u*) *Penny v. Allen*, 7 De G. M. & G. 425.

(*v*) *North v. Williams*, 2 Ch. Ca. 64, *per* Lord Nottingham; *Highway v. Banner*, 1 B. C. C. 586; and see *Wickham v. Wickham*, 18 Ves. 418.

(*w*) *Philips v. Brydges*, 3 Ves. 128, *per* Lord Alvanley; *Salvin v. Thornton*, Amb. 585; S. C. 1 B. C. C. 73, note.

(*x*) *Philips v. Brydges*, 3 Ves. 126, *per* Lord Alvanley, 2 Ch. Ca. 49; *Marwood v. Turner*, 3 P. W. 171; *Goodrick v. Brown*, 2 Ch. Ca. 49; S. C. Freem. 180.

(*y*) *Philips v. Brydges*, 3 Ves. 120; *Robinson v. Comyns*, Cas. t. Talb. 164, S. C. 1 Atk. 172.

(*z*) 3 & 4 Will. 4. c. 64.

(*a*) *Honywood v. Foster*, 30 Beav. (No. 1), 1.

α. If *quasi* tenant in tail in equity, with remainder over, be in *possession*, he may at any time, by a simple conveyance, dispose of the absolute interest, as against the issue, and the remainderman, and may even bind them in equity by his contract.

β. But if *quasi* tenant in tail be in *remainder* after a prior estate under the same settlement, he must have the consent of the tenant for life or other precedent freeholder, as otherwise, though he may bind his issue, he cannot destroy the remainder.

γ. If lands held *pur autre vie* be limited to or in trust for A. and the heirs of his body with remainder [* 695] over, the entirety of the estate* is vested in A., and the issue and the remainderman stand in the light of mere special occupants, that is, they have no title *jure suo* to any present interest, but merely take the estate by devolution where the owner has made no disposition.

δ. A limitation in *quasi* entail of an estate *pur autre vie* has been commonly assimilated to an estate in fee-conditional; but the natures of the two estates are not to be confounded. The tenant of a fee-conditional can only aliene after issue born, but tenant in *quasi* entail *pur autre vie* may dispose absolutely as above without reference to the fact of their being issue or not (b).

Assignee bound by all equities. *Secondly.* The assignee of an equity is bound by all the equities affecting it (c)¹.

1. In order to understand the limits of the rule, it will be necessary before entering upon the cases to make a few preliminary remarks.

G observations upon the rule. If A. be possessed of a legal *chose in action* (d), as if he be obligee of a bond, and assign it in equity for valuable consideration, here at the time of the assign-

(b) See the law upon this subject collected by Lord St. Leonards in *Allen v. Allen*, 1 Conn. & Laws. 427; and see *Edwards v. Champion*, 1 Eq. Rep. 419; *Betty v. Humphreys*, 9 I. R. Eq. 332; *Batteste v. Maunsell*, 10 I. R. Eq. 97, 314; [*Re Barber's Settled Estates*, 18 Ch. D. 624; *Blackhall v. Gibson*, 2 L. R. Ir. 49.]

[(c) A right of set off subsisting between the assignor and the person against whom the equity is enforceable being a right not attaching to the equity, but personal to the parties, will not affect the assignee, *Beresford v. Chambers*, 5 Ir. Eq. R. 482; *Burrough v. Moss*, 10 B. & C. 558; *Re Dublin and Rathcoole Railway Company*, 1 L. R. Ir. 98.]

(d) *Choses in action* are now made assignable if notice in writing be given to the debtor or trustee, [but they are expressly made subject in the hands of the assignee to the subsisting equities.] See 36 & 37 Vict. c. 66, s. 25, subs. 6.

¹ *Beebe v. Bank of New York*, 1 Johns. 529; *Kamena v. Huelbig*, 8 C. E. Green, 78; *Ragsdale v. Hagy*, 9 Gratt. 409; *The Bank v. Fordyce*, 9 Barr. 275; *Andrews v. McCorg*, 8 Ala. 920.

ment no equity existed in A.; and yet, as this case is confessedly within the operation of the rule, the maxim might perhaps be more accurately expressed by saying that the owner of an equity by assignment is bound by all the equities affecting what is assigned.

Again, if A., having a debt due to him, or being entitled to an equitable interest, charges it in favour of B., the equity which remains in A. is the debt or equitable interest subject to the charge. If, therefore, A. afterwards assign the same subject matter to C., it might be thought that C. could take nothing more than the interest of A. subject to the charge. This, however, is not the case, for the priorities of B. and C. will be regulated by the better or inferior equities of the respective parties. The rule does not mean that the assignee of an equity shall be bound by all the equities affecting * the assignor as between him and [* 696] previous purchasers or incumbrancers under the assignor, but only by such as affect the assignor as between himself and his debtor and any persons not claiming under himself. The assignor can indisputably only give what he himself has, but as between two persons claiming through him a conflict of right may well arise¹. This will be better understood by the instances exemplifying the rule to which we now proceed.

2. A person taking an equitable mortgage, with notice of a prior charge, transfers his mortgage to another who has no notice of the prior charge. The assignee is bound by the equity with which the assignor was affected (e).

Transfer of equitable mortgage.

3. A. mortgages or sells an equitable interest to B., which mortgage or sale is *fraudulently* obtained, and then B. transfers to C. Here C., whether he has notice of the fraud or not, takes subject to A.'s equity to have the mortgage or sale set aside (f).

Transfer of equitable interest obtained by fraud.

4. A trustee or executor has a beneficial interest, but is a debtor to the trust or executorship, and then assigns his beneficial interest to a stranger. The assignee cannot claim the beneficial interest without discharging

Trustee or cestui que trust debtor to trust estate.

(e) *Ford v. White*, 16 Beav. 120.

(f) *Cockell v. Taylor*, 15 Beav. 103; *Barnard v. Hunter*, 2 Jur. N. S. 1213; *Daubeny v. Cockburn*, 1 Mer. 626; see 638; *Parker v. Clarke*, 30 Beav. 54.

¹ Authorities however exist for the position that the assignee of the *chose in action* is subject only to the equities of the party bound by its obligation (the debtor) and not to those of prior assignees. *Livingston v. Dean*, 2 Johns. Ch. 479; *Mullison's Estate*, 18 P. F. Smith, 212; *Metzgar v. Metzgar*, 1 Rawle. See, however, *Bispham on Equity*, § 171.

the debt (*g*). And a similar equity attaches upon an assignee from a *cestui que trust* who is a debtor to the estate (*h*). [And where at the time of the assignment of a legacy, a suit by the legatee was pending to recall the probate, and the suit failed with costs to be paid by the legatee, the executor was allowed to set off the costs against the legacy notwithstanding the assignment (*i*). But where assets have been set apart and appropriated by executors to meet a trust legacy, no part of the appropriated assets can be retained or impounded to satisfy a debt from the legatee to the general estate of the testator, for the right of the legatee or his assignee is against the holders of the appropriated assets in their character of trustees, while the [* 697] liability of the legatee is to * them in their capacity of executors (*k*).] And where the assignor is a trustee or executor it is immaterial whether the debt to the trust or executorship was contracted before or *after the assignment* of the beneficial interest (*l*). But if the assignor did not *become trustee or executor until after the date of the assignment* there is no equity against the assignee in respect of a subsequently incurred debt (*m*). If the assignor be a *cestui que trust*, the trustee *after notice* cannot create any new charge or right of set-off, *as between him and the assignor*, so as to bind the assignee (*n*).

Debtor and
creditor.

5. A creditor transfers his debt to a person who has no notice that part of it has been discharged. The assignee is nevertheless bound by the state of the accounts

(*g*) *Clack v. Holland*, 19 Beav. 262; *Barnett v. Sheffield*, 1 De G. M. & G. 371; *Cole v. Muddle*, 10 Hare, 186; *Wilkins v. Sibley*, 4 Giff. 442.

(*h*) *Priddy v. Rose*, 3 Mer. 86; *Willes v. Greenhill*, (No. 1), 29 Beav. 376; *Stephens v. Venables* (No. 1), 30 Beav. 625; [*Corr v. Corr*, 3 L. R. Ir. 435; *Re Moore*, 45 L. T. N. S. 466.]

(*i*) *Re Knapman*, 18 Ch. D. 300. It must be borne in mind that the right to set off costs against costs in another matter or against a money payment is, in general, subject to the solicitors' lien, and can only be exercised with his consent, or where his interest will not be prejudiced by the exercise; *Ex parte Cleland*, 2 L. R. Ch. App. 808; *Re Harrauld*, 52 L. J. N. S. Ch. 435; 48 L. T. N. S. 352; 53 L. J. N. S. Ch. 505; 51 L. T. N. S. 441. But the lien does not interfere with the right to set off costs payable out of a trust fund against a debt due to that trust, the lien of the solicitor being itself subject to this equitable right of set off; *Re Harrauld*, 53 L. J. N. S. Ch. 505; 51 L. T. N. S. 441.]

[(*k*) *Ballard v. Marsden*, 14 Ch. D. 374.]

(*l*) *Hopkins v. Gowan*, 1 Moll. 561; *Morris v. Livie*, 1 Y. & C. C. C. 380.

(*m*) *Irby v. Irby*, 25 Beav. 632.

(*n*) *Stephens v. Venables* (No. 1), 30 Beav. 625.

at the time of the assignment (o); and when the assignee does not give notice to the debtor of the assignment so as to dissolve the relation of debtor and creditor between the original parties, the assignee is compelled to allow the payments to the creditor subsequent to the assignment (p).¹

[6. Shares in a company which are legally transferable are not subject in the hands of a *bonâ fide* transferee without notice, or *semble* in the hands of a person who *bonâ fide* and without notice has for value acquired a legal right to be registered, to equities affecting the transferor (q).] [Shares in a Company.]

In the case of securities issued by companies the following rules seem to apply—

(1). Where a company has power to issue securities, an irregularity in the issue cannot be set up against even the original holder if he has a right to presume *omnia rite acta*.

(2). If the security be legally transferable, such an irregularity and *à fortiori* any equity against the original holder cannot be asserted by the company against a *bonâ fide* transferee for value without notice.

(3). Nor can such an equity be set up against an equitable transferee, whether the security was transferable at law or not, if by the original conduct of the company in issuing the security, or by their subsequent dealing with the transferee he has a superior equity.

(4). Nor can such an equity be set up against an equitable transferee of a security, purporting on the face of it to be legally * transferable, who has [* 698] taken an equitable transfer *bonâ fide* and without notice from a transferor, who by reason of notice of the irregularity could not have enforced the security. But in this case the transferee can only recover the amount actually advanced or given by him upon the transfer (r).]

(o) *Ord v. White*, 3 Beav. 357; *Smith v. Parkes*, 16 Beav. 115; *Rolt v. White*, 31 Beav. 520; *Re Natal Investment Company*, 3 L. R. Ch. App. 355.

(p) *Norrish v. Marshall*, 5 Mad. 475; and see *Stocks v. Dobson*, 4 De G. M. & G. 11.

[q] *Briggs v. Massey*, 42 L. T. N. S. 49.]

[r] Per Kay, J., *Re Romford Canal Company*, 24 Ch. D. 85, 92; *Fountaine v. Carmarthen Railway Company*, 5 L. R. Eq. 316; *Webb v. Commissioners of Herne Bay*, 5 L. R. Q. B. 642; *Re Agra and Masterman's Bank*, 2 L. R. Ch. App. 391; *Re Blakely Ordnance Company*, 3 L. R. Ch. App. 154; *Dickson v. Swansea Vale Railway Company*, 4 L. R. Q. B. 44; *Higgs v. Northern Assam Tea Company*, 4 L. R. Ex. 387.]

¹ *Bury v. Hartman*, 4 S. & R. 175; *Pellman v. Hart*, 1 Pa. St. 266.

* 23 LWA OF TRUSTS.

Cavendish v.
Geaves.

7. It was decided in the case of *Cavendish v. Geaves* (s) that the assignee is liable to the same equities as his assignor, not merely in respect of the actual payments, but in regard to the right of *set-off*. In that case Sir John Romilly, M.R. laid down the following canons:

a. If a customer borrow money from his *bankers*, and give a *bond* to secure it, and afterwards on the balance of his general banking account a balance is due to the customer from the same bankers, who are the obligees of the bond, a right to set off the balance against the money due on the bond will exist both at law and in equity.

β. If the firm be altered and the *bond* be assigned by the original obligees to the *new firm*, and notice of that assignment be given to the *debtor* (t), and if, after this, a balance be due to him from the new firm (the assignees of the bond), then no right of set-off exists at law, because the assignment of the *chose in action* would be inoperative at law, and the obligees of the bond and the debtor on the general account are different persons; but as, in equity, the persons entitled to the bond, and the debtors on the general account are the same persons, a right of set-off exists in equity, and the customer is entitled to set off the balance due to him against the bond debt due from him.

γ. If the *bond* be assigned to *strangers*, and no notice of that assignment be given to the original *debtor* (the obligor of the bond), then his rights remain the same. Thus, if the assignment be made to the stranger before any alteration of the firm, then the right of set-off still remains at law, where the obligees of the bond and the debtors on the general account are the same persons, and in equity also, if the matter of account be brought into Chancery, as the assignees of the *chose in action* would be bound by the equities affecting their assignors.

[* 699] * δ. If notice of the assignment be given to the original *debtor*, no right of set-off exists in equity for the *balance subsequently due* by the bankers to the obligor; because the persons entitled to the bond are, as the obligor knew, different persons from the debtors, to him on the general account, with whom he had continued to deal.

ε. If the assignment of the bond be made to the *new firm*, with notice to the *obligor*, the new firm would, if

(s) 24 Beav. 163, see 173; [see *Re Dublin and Rathcoole Railway Company*, 1 L. R. Ir. 98.]

(t) See as to this, 36 & 37 Vict. c. 66, s. 25.

debtors on the general account be liable to the same rights of set-off in equity as if they had been the obligees.

5. If after the alteration of the firm and after the assignment of the bond to the new firm, with notice to the debtor or obligor, the bond be assigned by the new firm to *strangers*, and *no notice* of that second assignment given to the obligor, then the rights of set-off still remain to him in equity as against the first assignees, of whose assignment he had notice, and the second assignees would in equity be bound by it; because the assignees of the bond take it subject to all the equities which affect the assignors.

8. It may be observed that the right of *set-off*, though^{Set-off.} unknown to the common law, was recognized in equity previously to the statutory enactments on the subject. Thus where A. and B. were mutually indebted by *simple contract* dealings, and B. died also indebted to others by simple contract, and to one by *specialty*, in such a case, though it was contended that if A. could set off his own debt, he was to that extent paid in full, in preference to the other simple creditors, and at the expense of the specialty creditor, yet a Court of equity presumed an agreement between A. and B. that such set-off should be had, and as B. in his lifetime could not have recovered from A. without the set-off, it held that the personal representative of B. was bound by the same equity (u).

9. Recently the equity jurisdiction in respect of set-off has been chiefly, if not entirely, confined to cases where one or both of the cross demands is or are of an equitable kind (v). And it seems to be established that set-off will not be allowed even in equity where the mutual demands are between the parties in different rights; as if A. give a legacy to B., and appoint C. his executor, or executor and residuary legatee, B. may sue C. for the legacy, and C. cannot set off a debt owing by B. to C. not as executor but in C.'s own *right (w). [So where an executorship ac- [* 700]

(u) Downham v. Matthews, Pr. Ch. 580; see Jeffs v. Woods, 2 P. W. 128; and see 2 G. 2, c. 22; 8 G. 2, c. 24, s. 5; [since repealed by 42 & 43 Vict. c. 59, and 46 & 47, Vict. c. 49; and see 36 & 37 Vict. c. 66, and Rules of Supreme Court, Ord. XIX. r. 3.]

(v) See now 36 & 37 Vic. c. 66, and Rules of Supreme Court, Ord. XIX. r. 3.

(w) Whitaker v. Rush, Amb. 407; Bishop v. Church, 3 Atk. 691; Freeman v. Lomas, 9 Hare, 109; Chapman v. Derby, 2 Vern, 117; Medlicott v. Bower, 1 Ves. 207; Middleton v.

[Set-off.]

count was kept with bankers in the joint names of two executors, one of whom was the residuary legatee under the will, but the executorship account had never been wound up so as to make the executors mere trustees for the residuary legatee, on the failure of the bankers it was held that the residuary legatee was not entitled to have another account of his own with the bankers, which was overdrawn, set off against the executorship account; for "the case could not be brought within the rules of equitable set off or mutual credit, unless the residuary legatee was so much the person beneficially interested that a Court of equity without any terms or further inquiry would have obliged the other executor to transfer the account into the name of the residuary legatee alone" (x). But where, at the time of the failure of a bank, two accounts were standing in the name of a customer, one his private account, which was overdrawn, and the other an executorship account, and the executor, who was also residuary legatee, had assets in his hand independently of the balance at the bank more than sufficient to satisfy the pecuniary legacies and all other claims against the estate, it was held that he was entitled to set off the one account against the other, on the ground that there was a clear legal right of set-off, and there were no such equities affecting the monies standing to the executorship account as to prevent the customer from treating the balance as a fund to which he was beneficially as well as legally entitled [* 701] titled (y). And] a * defendant may make such

Pollock, 20 L. R. Eq. 29; [Ballard v. Marsden, 14 Ch. D. 374]; Cherry v. Boulton, 4 M. & Cr. 442, which was questioned by V. C. Wigram in Freeman v. Lomas, 9 Hare, 115, turned on the facts that C. F. Boulton never proved her debt so as to make it a liability of the assignee, and that T. Boulton never obtained his certificate, so that his liability remained, and thus the legacy was owing to one set of persons, viz., the assignees, and the debt from another, viz. T. Boulton. In Bell v. Bell, 17 Sim. 127, it does not appear whether the creditor had or not proved under the insolvency. If he had, the case could not be supported on the authority of Cherry v. Boulton, but if he had not it must stand or fall with that case. It is believed that in a subsequent stage of the suit, V. C. Kindersley decided the other way. See also Stammers v. Elliott, 3 L. R. Ch. App. 195; Taylor v. Taylor, 20 L. R. Eq. 159; [Re Hodgson, 9 Ch. D. 673, in which case Cherry v. Boulton was followed.]

[(x) *Ex parte Moirer*, 12 Ch. D. 491.]

[(y) *Bailey v. Finch*, 7 L. R. Q. B. 34; and see the observations on this case in *Ex parte Moirer*, *ubi supra*, where Cotton, L. J. observed, "As I understand it, the principle of the decision (whether right or wrong) was this, not that the fund was a trust fund from the nature of the account, or that the bankers had notice of that, but that they had notice that it was an account

admissions in his answer as to preclude himself from [Set-off.] objecting to the set-off at the hearing (z). However, an admission of assets for payment of the legacy will not have that effect (a). A legacy to one of the members of a firm may be set off against a debt owing by the firm (b). But a legacy to a married woman, and assigned by her under Malin's Act, cannot be retained by the executor as against the assignee in discharge of a debt by the husband to the testator's estate (c). [And a right to damages against an assignor which does not ripen into a debt until after his assignment of a debt due to him, cannot be set off against the debt due to the assignor and assigned by him (d).]

A person who owes a debt to a bankrupt at the time of his bankruptcy and has no right of set-off, cannot acquire such a right by taking an assignment of another debt due to another creditor of the bankrupt (e).

And where there are mutual dealings between a debtor and his creditors, the line as to set-off must, as a general rule and in the absence of special circumstances, be drawn at the date of the commencement of the bankruptcy; *Ex parte Reid*, 33 W. R. 707,

10. Where a policy of assurance on the life of H. was taken in the names of trustees, and a settlement was executed binding the policy in the hands of the trustees, but it was expressly provided that nothing in the settlement should vest in the trustees any bonus, and H. obtained possession of and misappropriated part of the trust funds, it was held, in an action by the executrix of H. to recover bonuses, that the trustees held the bonuses under a resulting trust independently of the settlement, and could not retain them against the losses incurred in respect of the funds misappropriated by H., and that as the claim of the executrix was in respect of money which was never payable to H. personally, but only after his death, while the claim of the trustees was

against which claims were likely to be made, and that if claims had at the time of the bankruptcy been made against it, they would have prevented the legal right of set-off from arising, but that, as it was not shown there were any equitable claims against the fund, the legal right of set-off could not be interfered with." p. 502.]

(z) *Jones v. Mossop*, 3 Hare, 568.

(a) *Freeman v. Lomas*, 9 Hare, 109.

(b) *Smith v. Smith*, 3 Giff. 263, see 270.

(c) *Re Batchelor*, 16 L. R. Eq. 481.

(d) *Ex parte Theys*, 22 Ch. D. 122; 25 Ch. D. 587.]

(e) *Per Lord Selborne*, L. C., *Ex parte Theys*, 25 Ch. D. 592.]

for money due from him in his lifetime, there was no right of set-off on the footing of mutual debts (*f*).]

Thirdly. Of Notice to the Trustee.

Notice.

1. As between *assignor and assignee* notice to the trustee is not necessary for the completion of an assignment (*g*)¹, even though the assignment be voluntary (*h*). [* 702] Nor is notice necessary for the * purpose of making the assignment effectual, as against subsequent volunteers (*i*), or as against persons claiming only a *general equity* under the assignor, such as a judgment creditor who obtains a charging order (*k*)². Or equitable execution by the appointment of a receiver subject to existing incumbrances; *Arden v. Arden*, 29 Ch. D. 702. But the omission of notice may be followed by very dangerous consequences by the operation of the reputed ownership clause under the bankrupt laws (*l*), or the acquisition of priority by subsequent purchasers or incumbrancers. And if the title be a derivative one, and not one that appears upon the face of the instrument creating the settlement, the trustee may, having neither express nor constructive notice, pay upon the footing of the original title, and in that case he cannot be made to pay over again to the assignee under the derivative title (*m*).

2. If the owner of an equitable interest in money or

[(*f*) *Hallett v. Hallett*, 13 Ch. D. 232; and see *Rees v. Watts*, 11 Exch. 410; *Newell v. National Provincial Bank of England*, 1 C. P. D. 496.]

(*g*) *Burn v. Carvalho*, 4 M. & Cr. 702; *Bell v. London and North Western Railway Company*, 15 Beav. 552; *Dufaur v. Professional Life Assurance Company*, 25 Beav. 599; *Re Lowe's Settlement*, 30 Beav. 95.

(*h*) *Donaldson v. Donaldson, Kay*, 711.

(*i*) *Justice v. Wynne*, 12 Ir. Ch. Rep. 289; *Re Webb's Policy*, 36 L. J. N. S. Ch. 341.

(*k*) *Scott v. Hastings*, 4 K. & J. 633.

(*l*) 46 & 47 Vict. c. 52, s. 44. [See *ante*, p. 242; and see *Ex parte Arkwright*, 3 Mont. D. & De G. 129; *Bartlett v. Bartlett*, 1 De G. & J. 127; *Re Webb's Policy*, *ubi sup.*; *Daniel v. Freeman*, 11 I. R. Eq. 233, 638; *Re Irving*, 7 Ch. D. 419; where it was held that the equitable assignment created a trust for the assignee and so took the case out of the order and disposition clause; *Re Power*, 11 L. R. Ir. 93.]

(*m*) *Cothay v. Sydenham*, 2 B. C. C. 391; *Leslie v. Baillie*, 2 Y. & C. C. C. 91; [and see *Re Lord Southampton's Estate*, *Banfathers's Claim*, 16 Ch. D. 178; *Re Lord Southampton's Estate*, *Roper's Claim*, 50 L. J. N. S. Ch. 155.]

¹ See the *Mt. Holly Co. v. Feree*, 2 C. E. Green. 117; *Pellman v. Hart*, 1 Barr. (Pa.) 263; *The People v. Elkwie*, 35 Cal. 653.

² As to the steps necessary to complete the transfer of a chose in action as against the creditors of the assignor see *Pinkerton v. Railroad*, 42 N. H. 424, and *Com. v. Watmough*, 6 Whart. 117.

stock, or generally of any *chose in action*, assign it to A., who gives no notice of the transfer to the trustee or debtor, and then for valuable consideration assigns it over again to B., who having had no notice of the prior assignment when he advanced his money, gives notice of his own assignment to the trustee or debtor, in this case B. has priority over A.¹ That a purchaser's notice will secure to him this advantage of priority has been only settled in modern times. In *Cooper v. Fynmore (n)*, Sir T. Plumer, V. C., decided that mere neglect to give notice would *not* postpone an incumbrancer, but that such *laches* ought to be shown as, in a Court of equity, would amount to fraud; but in *Dearle v. Hall (o)*, and *Loveridge v. Cooper (p)*, nine years after, his Honour, when Master of the Rolls, came to a contrary conclusion, and delivered a very elaborate argument that notice *would* gain priority. His Honour's judgments were affirmed on appeal (*q*), and the doctrine has been recognised in numerous subsequent cases (*r*). [And the same principle applies where the owner of the equitable interest has died after making * an assign- [*703] ment, and his *legal personal representative* has made a subsequent assignment of the interest to a purchaser for value without notice of the prior assignment (*s*).

But the principle does not extend to the shares of companies registered under the Companies Act, 1862, the 30th section of which provides that no notice of any trust expressed, implied, or constructive, shall be entered on the register; *Société Générale de Paris v. Tramways Union Company*, 14 Q. B. D. 424. The course which the assignee of an equitable interest in such shares should adopt for his protection is to serve a notice in lieu of *distringas* on the company under 5 Vict. c. 5, s. 5, and Order xlv. of the Rules of the Supreme Court, which will prevent any legal transfer being made

(n) 3 Russ. 60.

(o) 3 Russ. 1.

(p) Ib. 30.

(q) Ib. 38, 48.

(r) *Hutton v. Sandys*, 1 Younge, 602, see 607; *Smith v. Smith*, 2 Cr. & M. 231; *Foster v. Blackstone*, 1 M. & K. 297, see 307. For the principles upon which Sir T. Plumer proceeded, see 3 Russ. pp. 12-14, 20-22.

[(s) *Re Freshfield's Trust*, 11 Ch. D. 198.]

¹ The Bank of Commerce's Appeal, 23 P. F. Sm. 59; *Railroad v. Schuyler*, 34 N. Y. 30; *Shipman v. Aetna Ins. Co.*, 29 Conn. 245; *Vanbuskirk v. Ins. Co.*, 14 Conn. 145; *McWilliams v. Webb*, 32 Iowa, 577; *Murdoch v. Finney*, 21 Mo. 138. There are, however, some authorities in the United States to the contrary of the doctrine laid down in the text. See *Bispham on Equity*, § 169.

of the shares without notice to the equitable assignee, and will give him an opportunity to obtain an order restraining the transfer. It must not however be assumed that the directors of a company may safely ignore a notice given to them, and allow shares, which are to their knowledge affected by equitable rights, to be fraudulently transferred so as to destroy such rights. For if knowledge of the fraud can be brought home to the directors they would be liable as parties to the fraud; and in the opinion of Cotton, L. J., "where directors are asked to register a transfer, which from circumstances in fact known to them at the time would be in violation of the rights of others, they cannot either safely to themselves or without disregard of their duty register the transfer without allowing time for inquiry and for the assertion of the equitable rights, if any, inconsistent with the claim to register the transfer"; and in the opinion of Lindley, L. J., "a refusal by directors or an omission on their part to pay attention to a notice given to them by a person having an equitable interest in shares, and requiring the directors not to register a transfer for such time as might be necessary to allow him to apply for a proper restraining order, would be *prima facie* improper. Such conduct on the part of directors would be strong evidence of fraud;" S. C. pp. 445, 453. But see the observations of Brett, L. J.; S. C. p. 440.

As against
trustees in
bankruptcy.

3. This rule as to gaining priority by notice has been held to prevail not only as between two purchasers for value, but also as between a purchaser for value, and the assignees of a bankrupt neglecting to give notice; as, if A. being entitled to an equitable interest become bankrupt, and then assign it to a purchaser for valuable consideration without notice of the bankruptcy, who serves notice on the trustee, the purchaser gains priority over the assignees who gave no notice (*t*). In a case, however, arising under the Bankruptcy Act of 1849, it was held that an assignment, after bankruptcy, to an assignee who gave notice to the trustee before the assignees in bankruptcy, could not prevail against the title of the latter (*u*); [and in a subsequent case (*v*) where the same view was adopted by the Court of Appeal, L. J.

(*t*) *Re Barr's Trusts*, 4 K. & J. 219; *Re Atkinson*, 4 De G. & Sm. 548; 2 De G. M. & G. 140; *Re Russell's Policy Trusts*, 15 L. R. Eq. 26; [*Palmer v. Locke*, 18 Ch. D. 381;] and see *infra*, p. 711.

(*u*) *Re Mary Coombe's Will*, 1 Giff. 91.

[(*v*) *Re Bright's Settlement*, 13 Ch. D. 413; see the observations on this case in *Palmer v. Locke*, 18 Ch. D. 381; and in *Re Jake-man's Trusts*, 23 Ch. D. 344.]

Baggallay held that the 141st section of the Act of 1849, which governed the case, applied equally to all bankruptcies under the Act of 1861.] The judgment of the Court was grounded on the strong negative words in the Act (*w*); but similar words occur in the original Bankrupt Act of James I. (*x*), and the principle of the former decisions was that, as regards *equitable interests*, the Act can pass nothing more than the fullest assignment which the bankrupt could have made, and that *assignees by operation of law* cannot in a Court of equity be viewed as under less obligation to give notice than a *particular assignee*, who, generally speaking, is more favoured. It would seem that the rule as to notice cannot be applied as against assignees in bankruptcy where the subject matter of assignment is a *debt which was recoverable at law* by the bankrupt, since in that case the *legal title* vests in the assignees.

[4. A solicitor having a lien for costs on documents in his possession is under no obligation to give any further notice of his lien, the fact of his having possession of the documents being notice to all the world of the only fact (*viz.* possession) necessary to raise * the [* 704] lien. A subsequent assignee who has given notice will accordingly not gain priority (*y*).]

5. If a *cestui que trust* charge his interest, but gives no notice to the trustee, or gives notice to the trustee who dies so that the notice falls to the ground, and then a trustee subsequently appointed and having no notice of the charge, purchases from the *cestui que trust*, or takes a mortgage of his interest, such trustee stands in the position of an assignee, who, having no notice of the prior charge and giving notice of his own charge, gains a priority (*z*). Purchase by a trustee without notice.

6. The purchase of an equitable interest in *choses in action* should, for his security, never dispense with the two following precautions: *First*, he should make inquiries of the trustee or debtor whether the equity or claim of the vendor has been made the subject of any prior incumbrance. The purchaser, as the implied agent of the *cestui que trust*, has a right to require all neces- Cautions in assignment of equitable interests.

(*w*) "And after such appointment (*i. e.* of assignees) neither the bankrupt, nor any other person claiming through or under him, shall have power to recover the same," &c.; 12 & 13 Vict. c. 106, s. 141.

(*x*) 1 Jac. 1, c. 15, s. 13.

[(*y*) *West of England Bank v. Batchelor*, 51 L. J. N. S. Ch. 199.]

(*z*) *Phipps v. Lovegrove*, 16 L. R. Eq. 80; *London Chartered Bank of Australia v. Lemprière*, 4 L. R. P. C. 572.

sary information; and if the trustee or debtor refuse to answer the inquiry (a), or be guilty of misrepresentation, or even of mis-statement from forgetfulness, the purchaser may charge him personally with the amount of the consequent loss (b).¹ *Secondly*, upon the execution of the assignment, the purchaser should himself give notice of his own equitable title to the trustee or debtor, by means of which he will gain precedence of all prior incumbrancers who have not been equally diligent, and will prevent the postponement of himself to subsequent incumbrances more diligent than himself; and of course the trustee or debtor will be personally responsible, if, after such notice, he part with the fund to any person not having a prior claim (c).

Notice in
respect of
real estate.

7. Between *choses in action* and *real estate* there is an observable distinction. As regards the former the purchaser knows the legal title is outstanding in a third person, and is therefore bound to give notice of his incumbrance; but in *lands* it often happens that the vendor professes to have the legal ownership in himself, whereas it afterwards appears that it was really vested in some stranger. If the purchaser be not cognizant of the outstanding legal estate, he cannot give notice of [* 705] his interest, and therefore cannot be held * to have forfeited his right by having neglected a precaution that was impossible. On the other hand, to hold that the doctrine of notice does not apply at all to real estate, renders any dealings with equitable interests therein needlessly dangerous. Thus A. is entitled to an equitable interest, of which the legal estate is in B. upon trusts requiring B. to retain possession of the title-deeds, and not to part with the legal estate. A. conveys his interest to C., who makes no inquiries about incumbrances, and gives no notice to the trustee; A. afterwards, fraudulently concealing the previous assurance, conveys the same interest to D., who makes inquiries of the trustee respecting incumbrances, and gives him notice of his own charge. There seems no sound reason for postponing D. who has taken these precautions to C.,

(a) *Browne v. Savage*, 4 Drew. 639.

(b) *Burrows v. Lock*, 10 Ves. 470; *Browne v. Savage*, 5 Jur. N. S. 1020; S. C. 4 Drew. 635; *Slim v. Croucher*, 1 De G. F. & J. 518.

(c) *Hodgson v. Hodgson*, 2 Keen, 704; *Roberts v. Lloyd*, 2 Beav. 376; *Andrews v. Bousfield*, 10 Beav. 511.

¹ *Bank v. Jerome*, 18 Conn. 443; *Watson's Exrs. v. McLaren*, 19 Wend. 557; *Gourdon v. Ins. Co.*, 1 Binn. 433 n; *Elliott v. Callan*, 1 Pa. 24; *Buchanan v. Wurtz*, 5 W. 151.

who has merely priority in point of time. It is, however, now settled that the incumbrances in such a case are not grounds by the law of notice, but rank *primâ facie*, and in the absence of other controlling equities, in order of date (*d*)¹. However, the rule as to notice, though not applicable to estates in land, whether freehold or leasehold, applies when the subject matter is a sum of money to arise from a trust for sale of land (*e*), or which is charged upon land (*f*).

[8. Where a bankrupt before adjudication contracted to sell leasehold property, and received a deposit in respect of the purchase-money, and after the adjudication but before the purchaser had any notice of any act of bankruptcy received the balance of the purchase-money from the purchaser, it was held that the trustee in bankruptcy could not be compelled to assign the lease to the purchaser except upon the terms of his paying him the purchase-money. The equity of the purchaser under the contract was to have the property conveyed to him upon payment of the purchase-money to the person to whom the property belonged; and it was the purchaser's misfortune if he paid the money to a person who had ceased to be the owner of the property (*g*).]

[Purchaser completing bankrupt's contract without notice of bankruptcy.]

9. A second incumbrancer who advances his money *without enquiry* as to the existence of previous charges, but afterwards, * and before any notice given [* 706] by the first incumbrancer, gives notice of his own security, obtains thereby priority (*h*). The reason is, that, in the case supposed, non-enquiry by the second incumbrancer is immaterial, since the answer to an

Second incumbrancer giving notice but making no enquiries.

(*d*) *Lee v. Howlett*, 2 K. & J. 531; *Wiltshire v. Rabbits*, 14 Sim. 76; and see *Wilmot v. Pike*, 5 Hare, 14; *Bugden v. Bignold*, 2 Y. & C. C. C. 392; *Rochard v. Fulton*, 7 Ir. Eq. Rep. 131; *Rooper v. Harrison*, 2 K. & J. 86; *Prosser v. Rice*, 28 Beav. 68; *Pease v. Jackson*, 3 L. R. Ch. App. 576; *Phipps v. Lovegrove*, 16 L. R. Eq. 80. As to the effect of notice upon a transfer of railway shares, see *Dunster v. Lord Glengall*, 3 Ir. Ch. Rep. 47.

(*e*) *Lee v. Howlett*, 2 K. & J. 531; *The Consolidated Investment, &c. Company v. Riley*, 1 Giff. 371; *Foster v. Blackstone*, 1 M. & K. 297, 9 Bligh, N. S. 332; *Arden v. Arden*, 29 Ch. D. 702.

(*f*) *Re Hughes's Trust*, 2 H. & M. 89; [*Daniel v. Freeman*, 11 I. R. Eq. 233, 638.]

[(*g*) *Ex parte Rabbidge*, 8 Ch. D. 367.]

(*h*) *Foster v. Blackstone*, 1 M. & K. 297; *Foster v. Cockerell*, 9 Bligh, N. S. 376; *Timson v. Ramsbottom*, 2 Keen, 49; and see *Etty v. Bridges*, 2 Y. & C. C. C. 494; *Warburton v. Hill, Kay*, 478.

¹ The recording laws in force in the United States would prevent such a question as that suggested in the text from arising.

enquiry would have been that there were no prior charges, whereas the absence of notice by the first incumbrancer works an *ex post facto* injury to the second, who, if informed at the time of giving his own notice of the existence of the earlier charge, would immediately have exerted himself to obtain repayment of his money (i).

Notice to one of several co-trustees. 10. If notice be given to *one of several* co-trustees, it is sufficient as against all subsequent incumbrancers *during the lifetime of that trustee*; for the subsequent incumbrancer should have made enquiry of *all* the trustees, and if he had done so he would have come to a knowledge of the prior charge, so that *here* non-enquiry is material (k).

Death of the single trustee to whom notice was given. 11. But if a prior incumbrancer content himself with giving notice to *one* of the trustees, and that trustee *dies*, and a second incumbrancer gives notice of his assignment, then, as the first incumbrancer did not do his utmost to guard against the fraud, and the second incumbrancer had no means in his power of detecting the fraud, the loss will fall on the person who had so far occasioned that he might have prevented it (l).

Enquiry by incoming trustees of outgoing trustees. 12. If there be two trustees, and notice be given to *both of them*, and then one dies and the other retires, and new trustees are appointed in the place of both, and the new trustees having no notice of the charge distribute the fund, the incumbrancer cannot hold the *new trustees liable* as for a misapplication on the ground that, when appointed, they ought to have enquired of the retiring trustee whether he had notice of any charge in which case it would have come to their knowledge (m).

Where the assignor or assignee is one of the trustees. 13. As the rule requiring notice is not only to prevent the trustees from parting with the fund, but also and more particularly to enable future purchasers to ascertain prior incumbrances, it has been held that [* 707] where the *assignor*, the party beneficially *interested, is also one of the trustees, the notice which he has is not sufficient, as it is so strongly his interest to suppress the assignment. But if the *assignee* be one of the trustees, the notice which *he* has is sufficient, for

(i) *Meux v. Bell*, 1 Hare, 86, 87.

(k) *Smith v. Smith*, 2 Cr. & M. 231; *Ex parte Rogers*, 8 De G. M. & G. 271; *Willes v. Greenhill* (No. 2), 29 Beav. 387; S. C. 4 De G. F. & J. 147; and see *Ex parte Hennessey*, 1 Conn. & Laws. 562; *Wise v. Wise*, 2 Jon. & Lat. 412.

(l) See *Meux v. Bell*, 1 Hare, 73; *Ex parte Hennessey*, 1 Conn. & Laws. 562; *Timson v. Ramsbottom*, 2 Keen, 35; [*Re Hall*, 7 L. R. Ir. 180; [but see *Willes v. Greenhill* (No. 2), 29 Beav. 387.

(m) *Phipps v. Lovegrove*, 16 L. R. Eq. 80.

he will of course, for his own protection, take care to apprise future incumbrancers of the assignment to himself (*n*).

[A trustee having himself a charge upon the trust fund is not, in the absence of enquiry, bound to communicate that charge to a person giving him notice of a subsequent charge (*o*); but a trustee concealing his own prior charge would be narrowly watched by the Court, and it is conceived that if by his conduct he had led the subsequent incumbrancer to believe the fund to be unincumbered, he would lose his priority.]

14. As an incumbrancer may, by giving notice to one trustee, complete his title for the time, and yet may afterwards by the death of the trustee be displaced; so, if notice be sent to *all* the trustees, and they *all* die, a second incumbrancer, who gives notice to the succeeding trustees, will gain priority. Notice properly given at the time does not make an absolute title, but one liable to be defeated by an alteration of circumstances (*p*). An incumbrancer, therefore, would do well not only to give notice to *all* the trustees in the first instance, but to watch as well he can the changes in the state of the trust, and to take care, by repeating his notice, that there is never a set of trustees of whom there is not at least *one* who has notice of his charge.

Notice to *all*
the trustees,
and *all* dying.

15. Notice of an equitable incumbrance ought to be given to the trustees as early as possible, but if delayed for any length of time, it will be equally efficacious, provided no notice of any other charge has been served in the interval (*q*). Therefore, if the owner of an equitable interest, but who has given no notice to the trustees, contract for the sale of it, the purchaser cannot object to the title on the ground of no notice having been given, unless he can show some intermediate incumbrance; but it is the vendor's duty, by pointing out who have been the trustees from time to time, to furnish full means to the purchaser of enquiring whether or no any such charge has been created (*r*).

Time of
giving
notice.

(*n*) *Browne v. Savage*, 4 Drew. 635; *Willes v. Greenhill* (No. 1), 29 Beav. 376; *S. C.* (No. 2), 29 Beav. 391; *Newman v. Newman*, 28 Ch. D. 674.

[(*o*) *Re Lewer*, 4 Ch. D. 101; 5 Ch. D. 61.]

(*p*) *Phipps v. Lovegrove*, 16 L. R. Eq. 80; and see *Meux v. Bell*, 1 Hare, 97; but see *Etty v. Bridges*, 2 Y. & C. C. C. 492; *Browne v. Savage*, 4 Drew. 635; *Re Durand's Trusts*, 8 W. R. 33.

(*q*) *Meux v. Bell*, 1 Hare, 86, *per* Sir J. Wigram; *Browne v. Savage*, 5 Jur. N. S. 1020; and see *Stocks v. Dobson*, 4 De G. M. & G. 17.

(*r*) *Hobson v. Bell*, 2 Beav. 17.

Notice to a person about to become a trustee.

[* 708] * 16. Notice to a person who is *not actual trustee at the time*, but who may and probably will become such, confers no right to priority. Thus, where A. had a first charge, and B. the second charge, on the proceeds to arise from the sale of an officer's commission; and B. first, and then A., gave notice of their respective charges to the army agent of the regiment; but both notices preceded the time when the army agent first actually assumed the character of trustee; it was held that A. retained his priority (s). [Where an officer retires under "The Regulation of the Forces Act, 1871," (t) the amount payable on his retirement, though previously lodged with the army agents and entered in their books under the officer's name, cannot be affected by notice of an incumbrance created by him until after his retirement is gazetted (u). But as soon as the retirement is gazetted, the amount lodged becomes the money of the retiring officer in the hands of the army agents, and is liable to set off in respect of any monies owing by the officer to the army agents (v).]

17. These cases do not disturb the great principle that an equitable assignment is complete, if notice be given to the person by whom payment of the assigned debt is to be made, whether that person be himself liable, or is merely charged with the duty of making the payment; and it is not material whether the right to receive the money and the consequent obligation to pay is at the time when the notice is given absolute or conditional, so long as the person who receives the notice is himself bound by some contract or obligation at the time when notice reaches him to receive and pay over, or to pay over if he has previously received, the fund out of which the debt is to be satisfied. The cases on the sales of commissions turn upon the fact that the notice was given to a mere *possible* agent before he was an *actual* agent,—before the time when he was in any sense liable to make payment, neither being himself a debtor nor at that time charged with the duty of paying the money in question (w).

(s) *Addison v. Cox*, 8 L. R. Ch. App. 76; *Buller v. Plunkett*, 1 J. & H. 441; *Webster v. Webster*, 31 Beav. 393; *Somerset v. Cox*, 33 Beav. 634; [*Roxburghe v. Cox*, 17 Ch. D. 520;] and see *Calisher v. Forbes*, 7 L. R. Ch. App. 109; *Yates v. Cox*, 17 W. R. 20.

[(t) 34 & 35 Vict. c. 86.]

[(u) *Johnstone v. Cox*, 16 Ch. D. 571; 19 Ch. D. 17.]

(v) *Roxburghe v. Cox*, 17 Ch. D. 520.]

(w) *Addison v. Cox*, 8 L. R. Ch. App. 79, *per* L. C. Selborne.

18. The doctrine of priority by notice applies only Notice as between volunteers. in favour of *purchasers*; for as between two *volunteers* notice is not necessary, but *qui prior est tempore potior est jure*, whether the first assignee did or not give notice (*x*).

* 19. Where two or more notices are served [* 709] Simultaneous notices. simultaneously, the incumbrances rank according to their respective dates (*y*)

20. The notice, written or unwritten (*z*), but better To whom notice should be given. written, should be given to the trustees themselves, [and notice to the solicitors of the trustees will be of no effect unless the solicitors are expressly or impliedly authorized to receive such notices (*a*);] and where there are *two settlements*, one original and the other derivative, the notice should be given to the trustees of the original settlement who held the property (*b*). Where notice to one trustee would be sufficient, it may be given to one who is not the acting trustee, the law recognising no distinction between an acting and a passive trustee (*c*). Where the trust fund consists of shares in a *company*, the notice may be sent to the *secretary* (*d*); but notice to A., a *director*, and B., the *actuary*, was in one case considered sufficient (*e*); and, in another, notice to A., one of the directors, and B., an *auditor* (*f*); and in another verbal notice, not casually, but in the way of business, to the *board of directors* (*g*);

(*x*) *Justice v. Wynne*, 12 Ir. Ch. Rep. 289. This was so laid down by L. C. Brady, and his opinion carries the greater weight with it, as at the original hearing he had thought otherwise; see S. C. 10 Ir. Ch. Rep. 489.

(*y*) *Calisher v. Forbes*, 7 L. R. Ch. App. 109; [*Johnstone v. Cox*, 16 Ch. D. 571; 19 Ch. D. 17.]

(*z*) *Smith v. Smith*, 2 Cr. & M. 231; *Ex parte Carbis*, 4 Deac. & Ch. 357, *per* Sir G. Rose; S. C. 1 Mont. & Ayr. 695, note, *per eundem*; *Browne v. Savage*, 4 Drew, 640; *Re Tichener*, 35 Beav. 317; *Re Agra Bank*, 3 L. R. Ch. App. 555.

[(*a*) *Saffron Walden Second Benefit Building Society v. Rayner*, 14 Ch. D. 406; *Arden v. Arden*, W. N., 1885, p. 61; and see *Re Durand's Trusts*, 8 W. R. 33;] *Foster v. Blackstone*, 1 M. & K. 297, 306; *Rickards v. Gledstones*, 3 Giff. 298; *Willes v. Greenhill* (No. 2.), 29 Beav. 392; *Arden v. Arden* is now reported in 29 Ch. D. 702.

(*b*) *Bridge v. Beadon*, 3 L. R. Eq. 664.

(*c*) *Smith v. Smith*, 2 Cr. & M. 233.

(*d*) *Ex parte Stright*, Mont. 502; and see *Alletson v. Chichester*, 10 L. R. C. P. 319.

(*e*) *Ex parte Watkins*, 1 Mont. & Ayr. 689; S. C. 4 Deac. & Ch. 87; but see *Ex parte Hennessey*, 1 Conn. & Laws. 559.

(*f*) *Ex parte Waithman*, 4 Deac. & Ch. 412; but see *Ex parte Hennessey*, 1 Conn. & Laws. 559.

(*g*) *Re Agra Bank*, 3 L. R. Ch. App. 555; and see *Ex parte Richardson*, Mont. & Ch. 43; *Alletson v. Chichester*, 10 L. R. C. P. 319.

but the fact that the secretary or any other officer of the company had casual knowledge, acquired in his individual capacity and not whilst engaged in transacting the business of the company, of any matter, will not affect the company with notice of it; *Société Générale de Paris v. Tramways Union Company*, 14 Q. B. D. 424. And it was at one time held that, as notice to a partner was notice to the partnership, if by the constitution of an assurance office the person insuring became a partner, the assignment of a policy by him was *ipso facto* notice of it to the society (*h*); but this was going very far, as it was the assignor's interest to suppress the assignment, and the point has since been ruled the other way (*i*). The negotiation for the assignment through a solicitor, who happens to be the local agent of the insurance office, is not notice to the office (*k*). Incidental mention of the charge to a clerk of the company, though in the office of business, will not be constructive notice to the company itself (*l*); and the fact that the solicitor to the trustees was a creditor under an insolvency, and must have known of the insolvency, was no notice of it to the trustees (*m*).

Notice must be clear.

21. If the notice be by parol it must be clear and distinct (*n*), [and sufficient to bring to the mind of the trustee an intelligent apprehension of the nature of the dealing with the trust property, so that he may regulate his conduct by it in the execution of the trust (*o*).]

An error in the notice in an immaterial point, such as the date of the deed of which notice is given, will not invalidate it (*p*).

By whom notice should be given.

22. It was held by Lord Romilly, M.R., that the notice should be given by or on behalf of the assignee himself, and that notice to a trustee proceeding from a mere stranger would be insufficient (*q*), but the case on appeal was reversed on the ground that the trustee had

(*h*) *Duncan v. Chamberlayne*, 11 Sim. 126; *Ex parte Rose*, 2 Mont. D. & De G. 131; and see *Ex parte Cooper*, Id. 1; *Re Styan*, Ib. 219, and 1 Ph. 105.

(*i*) *Ex parte Hennessey*, 1 Conn. & Laws. 559; *Thompson v. Speirs*, 13 Sim. 469; *Martin v. Sedgwick*, 9 Beav. 333; and see *Powles v. Page*, 3 C. B. 16; *Ex parte Boulton*, 1 De G. & J. 175.

(*k*) *Re Russell's Policy Trusts*, 15 L. R. Eq. 26.

(*l*) *Ex parte Carbis*, 4 Deac. & Ch. 354; S. C. 1 Mont. & Ayr. 693, note (*a*).

(*m*) *Re Brown's Trust*, 5 L. R. Eq. 88.

(*n*) *Re Tichner*, 35 Beav. 317; *Re Brown's Trust*, 5 L. R. Eq. 88.

(*o*) *Lloyd v. Banks*, 3 L. R. Ch. App. 488, 490; *Saffron Walden Second Benefit Building Society v. Rayner*, 14 Ch. D. 406.]

(*p*) *Whittingstall v. King*, 46 L. T. N. S. 520.]

(*q*) *Lloyd v. Banks*, 4 L. R. Eq. 222; 3 L. R. Ch. App. 488,

received such notice as he would or should have acted upon (r).

23. Where the trustee himself is the assignee or incumbrancer, the transaction necessarily carries notice along with it, and no other notice is necessary (s). So in the case of a *Joint Stock Bank*, the lien of the bank under the deed of settlement for a debt owing from one of its members, does not require any further notice than that which the bank, the only trustee, already possesses from the relative position of the parties (t).

Where trustee is incumbrancer.

24. The notice, if it go into details at all, should set forth the entire amount of the assignee's claim, for it has been held that the trustee is affected by notice only of the amount stated upon the face of the memorandum served, and not by notice of all the contents of the instrument to which the memorandum refers (u). But notice of a charge in *general terms* without expressing any amount in particular, will be sufficient (v); and if there be no doubt as to the fund intended, a *mistake* in the description will not vitiate the notice as against a subsequent purchaser, but the * Court will [* 711] not extend the security beyond the amount of the sum mentioned in the notice as intended to be charged (w).

Form of the notice.

25. Where the fund is in *Court* the step equivalent to notice is the obtaining of a *stop-order* to restrain the transfer of the fund, and as between two assignees the one who first gets a stop order will have priority (x); [though the other may have given prior notice to the trustees of the settlement (y), and] though the first stop order was upon the general fund, and the second stop-order was the first upon the share when carried over to the separate account of the debtor and his incumbrancers (z); and trustees in bankruptcy who claim under the order and disposition clause in the Bankruptcy Act will lose the benefit of the transfer to them, if an assignee for value give notice to the Court of his incumbrance before any notice is given of the

Case of the fund being in Court.

(r) 3 L. R., Ch. App. 488.

(s) *Elder v. Maclean*, 3 Jur. N. S. 283; *Ex parte Smith*, 4 Deac. & Ch. 579; *Ex parte Smart*, 2 Mont. & Ayr. 60.

(t) Assignees of *Dunne v. Hibernian Joint Stock Company*, 2 Ir. Rep. Eq. 82.

(u) *Re Bright's Trust*, 21 Beav. 430.

(v) *Ib.* 434.

(w) *Woodburn v. Grant*, 22 Beav. 483.

(x) *Greening v. Beckford*, 5 Sim. 195; *Swayne v. Swayne*, 11 Beav. 463; *Elder v. Maclean*, 3 Jur. N. S. 283.

[(y) *Pinnock v. Bailey*, 23 Ch. D. 497.]

(z) *Lister v. Tidd*, 4 L. R. Eq. 462.

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assignment under the bankruptcy (a); but the incumbrancer who obtains the first stop-order will not prevail over an incumbrancer who gave the regular notice to the representative of the trust *before the money was paid into Court* (b); [nor will he prevail over a prior incumbrancer of whose incumbrance he had notice at the time of making his advance (c).] And even after the money has been paid into Court, although the *legal* title is in the *Paymaster-General* (d), the *trustees* remain such for the purposes of *notice*, and priority may be gained by serving notice upon the trustees (e).

[But where part of the trust estate was in Court and part in the hands of the trustees, and a first mortgagee gave notice to the trustees but did not obtain a stop-order, and a subsequent incumbrancer both gave notice and obtained a stop-order, the first mortgagee had priority as to the funds in the hands of the trustees, and the second mortgagee had priority as to the funds in Court (f).]

Notice to trustee, where fund in Court and neither assignee obtains a stop-order, confers priority.

26. Should an incumbrancer give *notice* to the trustees, but *neglect to obtain a stop-order*, he will still take precedence of a prior incumbrancer, who has neither obtained an order nor given notice, or who had give notice [* 712] to only one of several trustees, and that * trustee had died before the time of the second incumbrance. It is true the second incumbrancer did not adopt every precaution, but he resorted to one which the prior incumbrancer neglected to the detriment of the second incumbrancer, while the first assignee either sent no notice, or one which, by the death of the trustee before the time of the second incumbrance, had become equivalent to no notice (g).

Precaution where the fund is in Court.

27. If the trust fund be in Court, the following course should be adopted. The intended assignee should enquire at the Paymaster-General's and Registrar's offices whether any stop-order has been made

(a) *Stuart v. Cockerell*, 8 L. R. Eq. 607; and see *supra*, note (b), p. 703.

(b) *Livesey v. Harding*, 23 Beav. 141; *Brearclyff v. Dorrington*, 4 De G. & Sm. 122; and in *Thomas v. Cross*, 2 Dr. & Sm. 423, the same doctrine was applied as between two judgment creditors.

[(c) *Re Holmes*, W. N. 1885, p. 6.]

(d) *Thorndike v. Hunt*, 3 De G. & J. 563.

(e) *Thompson v. Tomkins*, 2 Dr. & Sm. 8; *Matthews v. Gabb*, 15 Sim. 51; *Warburton v. Hill*, Kay, 477; *Bartlett v. Bartlett*, 1 De G. & J. 127; [but see *Mutual Life Assurance Society v. Langley*, 26 Ch. D. 686.]

[(f) *Mutual Life Assurance Society v. Langley*, 26 Ch. D. 686.]

(g) *Timson v. Ramsbottom*, MS.; S. C. 2 Keen, 35, pp. 49 and 50; *Matthews v. Gabb*, 15 Sim. 51; [*Re Hall*, 7 L. R. Ir. 180.]

to restrain the transfer of the fund, and *also* of the trustees, whether notice has been given of any prior incumbrance; and, on the completion of his own assignment, he should give notice to the trustees personally, and obtain a stop-order himself, and leave it at the Paymaster-General's office to be entered. If the Paymaster-General's office is closed, the order should still be entered at the Registrar's office (*h*). The enquiry at the Paymaster-General's or Registrar's offices is merely for the purchaser's greater satisfaction, and makes no part of his own title, for neither the Paymaster-General nor the Registrar is the trustee, but the Court is the trustee. The stop-order is the effective step, and whether previous enquiry was or not made at the Paymaster-General's or Registrar's offices, is immaterial (*i*).

28. It may happen that at the time of the incumbrance there is no *representative* of the trust on whom notice can be served, as if A. be trustee of stock for B., and A. dies intestate, or his executor declines to act. In such a case it has been held, that an incumbrancer gains priority by taking all the precautions that under the circumstances are practicable, as if he serves a [notice in lieu of] *distringas* on the Bank where the stock is standing (*k*).

Case where there is no trustee.

29. A purchaser who gives notice, or obtains a stop-order, can gain no priority over an incumbrance of which he *has notice himself*, at the time of his own purchase (*l*).

Purchaser with notice.

30. By 36 & 37 Vict. c. 66, s. 25, sub-s. 6, any *legal chose in action* may be assigned at law by writing under the hand of the * assignor (not purporting to be by way of charge only) (*m*) upon express notice in writing being given to the legal holder of the *chose in action*, but subject to all the equities which would have been entitled to priority had the Act not passed. The notice of assignment of a policy of assurance which is required to be given by "The Policies of

36 & 37 Vict. c. 66, s. 25, sub-s. 6.

(*h*) As to the practice respecting stop-orders (which may be obtained at chambers, where the assignee and assignor concur); see [Rules of the Supreme Court, Ord. 46, R. R. 12 & 13.]

(*i*) See Warburton *v.* Hill, Kay, 478.

(*k*) Etty *v.* Bridges, 2 Y. & C. C. C. 486. [See as to the notice which has been substituted in the place of the writ of *distringas* Rules of the Supreme Court, Ord. 46, R. R. 2 *et seq.*; and *post*. Chap. xxxii, s. 1.]

(*l*) Warburton *v.* Hill, Kay, 470; *Re* Holmes, W. N. 1885, p. 6.]

[*m*] As to the meaning of the words "not purporting to be by way of charge only," see National Provincial Bank *v.* Harle 6 Q. B. D. 626; Burlinson *v.* Hall, 12 Q. B. D. 347.]

Assurance Act, 1867" (30 & 31 Vict. c. 144) to enable the assignee to sue, is not requisite to complete the title of the assignee as against a subsequent assignee; and accordingly a second incumbrancer who advanced his money with notice of a prior incumbrance, does not by giving the statutory notice gain priority over the prior incumbrancer who has neglected to give the notice; *Newman v. Newman*, 28 Ch. D. 674.

Fourthly. Of the rule *Qui prior est tempore potior est jure*.

General rule. 1. "The rule," observed V. C. Kindersley (n), "is sometimes expressed in this form;—'As between persons having only equitable interests, *qui prior est tempore potior est jure*.' This is an incorrect statement of it; for not only is it not universally true, as between persons having only equitable interests, but it is not universally true even where their equitable interests are of precisely the same nature, and in that respect precisely equal, as in the common case of two successive assignments for valuable consideration of a reversionary interest in stock standing in the names of trustees, where the second assignee has given notice, and the first has omitted it. Another form of stating the rule is this:—'As between persons having only equitable interests, if their equities are equal, *qui prior est tempore potior est jure*.' But even this enunciation of the rule (when accurately considered) seems to involve a contradiction. For when we talk of two persons having equal or unequal equities, in what sense do we use the word 'equity'? For example, when we say that A. has a better equity than B., it means only that, according to those principles of right and justice, which a Court of equity recognises and acts upon, it will prefer A. to B., and will interfere to enforce the rights of A. as against B. And therefore it is impossible (strictly speaking) that two persons should have equal equities, except in a case in which the Court of equity would altogether refuse to lend its assistance to either party as against the other. To lay down the rule, therefore, with perfect accuracy, I think it should be stated in some such form as this:—'As between persons having only equitable interests, if their equities are *in all other respects* equal, priority of time gives the better equity; or *qui prior est tempore potior est jure*.'" "Questions of priority between equitable incumbrancers," said L. J. Turner, "are in general governed by the rule *qui*

(n) *Rice v. Rice*, 2 Drew. 77.

prior est tempore potior est jure. The rule, as I conceive, is founded on this principle, that the creation or declaration of a trust vests an estate in the person in whose favour the trust is created or declared.

* Where, therefore, it is sought to postpone an [*714] equitable title created by declaration of trust, there is an estate or interest to be displaced. No doubt there may be cases so strong as to justify this being done, but there can be as little doubt that a strong case must be required to justify it" (o).¹

2. For ascertaining priorities, the Court directs its attention to the nature and condition of the conflicting equitable interests, the circumstances and manner of their acquisition, and the whole conduct of the respective parties: in short, all the circumstances of the case (p). The following instances will suffice for illustration.

All circumstances to be considered.

3. A vendor has an equitable lien for his purchase-money; but if he deliver the deed of conveyance with a receipt for the purchase-money indorsed and signed, and the purchaser then makes an equitable mortgage of the property by deposit, the equity of the mortgagee, who was deceived by the deed, is better than that of the vendor, who was careless enough to sign the receipt without payment of the money (q). But if the mortgagee have notice of the lien, he of course cannot complain, and is bound by it (r).

Vendor's lien.

4. The possession of the *title deeds* is a circumstance which may give the holder a better equity, provided they have come into his possession from want of due activity on the part of the prior incumbrancer, or through some neglect or default of such incumbrancer (s). But the *onus* lies on the holder to establish a

Possession of title deeds.

(o) *Cory v. Eyre*, 1 De G. J. & S. 167.

(p) *Rice v. Rice*, 2 Drew. 78, *per* V. C. Kindersley.

(q) *Rice v. Rice*, 2 Drew. 73; *West v. Jones*, 1 Sim. N. S. 205; *The Queen v. Shropshire Union Canal Company*, 8 L. R. Q. B. 420; [and see now 44 & 45 Vict. c. 41, s. 54.]

(r) *Mackreth v. Symmons*, 15 Ves. 349.

(s) *Layard v. Maud*, 4 L. R. Eq. 397; see *Rice v. Rice*, 2 Drew. 80; *Waldron v. Sloper*, 1 Drew. 200; *Perry-Herrick v. Attwood*, 25 Beav. 205, 2 De G. & J. 21; *Pease v. Jackson*, 3 L. R. Ch. App. 576; *Briggs v. Jones*, 10 L. R. Eq. 92; *Re Russell Road Purchase-moneys*, 12 L. R. Eq. 78; [*Clarke v. Palmer*, 21 Ch. D. 124; *Re Lambert's Estate*, 11 L. R. Ir. 534; 13 L. R. Ir. 234; *Lloyd's Banking Company v. Jones*, W. N. 1885, p. 55;] and see *Ratcliffe v. Barnard*, 6 L. R. Ch. App. 652; [*Spencer v. Clarke*, 9 Ch. D. 137;] *Lloyd's Banking Company v. Jones* is now reported in 29 Ch. D. 221.

¹ *Judson v. Corcoran*, 17 Howard, 612.

case of blamable conduct against the first incumbrancer (*t*); and the second incumbrancer gains no priority if the deeds get into his hands by an accident or by the misconduct of a stranger (*u*), or the wrongful act of the solicitor of the first incumbrancer (*v*), for it is not the doctrine of the Court that in the case of mere equitable interests priority can be obtained through the medium of a breach of trust or duty (*w*).

[* 715] * [The whole question as to what conduct in relation to the title deeds on the part of a mortgagee who has the legal estate, is sufficient to postpone such mortgagee to a subsequent equitable mortgagee who has obtained the title deeds without knowledge of the legal mortgage, has been fully discussed by the Court of Appeal (Cotton, Bowen and Fry, L.JJ.) in a recent case (*x*); in which the Court, after reviewing and classifying the earlier cases, arrived at the following conclusions:—

“(1). That the Court will postpone the prior legal estate to a subsequent equitable estate—(A), where the owner of the legal estate has assisted in or connived at the fraud which has led to the creation of a subsequent equitable estate, without notice of the prior legal estate; of which assistance or connivance, the omission to use ordinary care in inquiry after or keeping title deeds may be, and in some cases has been, held to be sufficient evidence, where such conduct cannot be otherwise explained; (B), where the owner of the legal estate has constituted the mortgagor his agent with authority to raise money, and the estate thus created has, by the fraud or misconduct of the agent, been represented as being the first estate.

But (2) that the Court will not postpone the prior legal estate to the subsequent equitable estate on the ground of any mere carelessness or want of prudence on the part of the legal owner” (*y*).

(*t*) *Allen v. Knight*, 5 Hare, 272, 11 Jur. 527; *Dixon v. Muckleston*, 8 L. R. Ch. App. 155.

(*u*) *Rice v. Rice*, 2 Drew. 83.

(*v*) *Cory v. Eyre*, 1 De G. J. & S. 149; [*Bradley v. Riches*, 9 Ch. D. 189.]

(*w*) *Cory v. Eyre*, 1 De G. J. & S. 170; [and see *Harphan v. Shacklock*, 19 Ch. D. 207.] But see *The Queen v. Shropshire Union Canal Company*, 8 L. R. Q. B. 420; 7 L. R. H. L. 496; [*Bradley v. Riches*, 9 Ch. D. 189.]

[(*x*) *Northern Counties of England Fire Insurance Company v. Whipp*, 26 Ch. D. 482, 491.]

[(*y*) p. 494. The whole judgment deserves careful perusal.] And see *Lloyd's Banking Company v. Jones*, 29 Ch. D. 221; *Manners v. Mew*, 29 Ch. D. 725.

5. If a trustee in whose name shares in a company [Trustee im- are standing borrow money for his own purposes and properly deposit the certificates as a security for his debt, the dealing with equitable title of the mortgagee will not in the absence of negligence on the part of the *cestui que trust* prevail against the prior equitable title of the *cestui que trust* (z). share certificates.]

6. Where trust funds were invested in the names of two trustees in the shares of a bank, the articles of which provided that the bank should have a paramount charge on the shares held by more persons than one in respect of all monies owing to the bank from all or any of the holders thereof, alone or jointly with any other person, it was held that the bank had a lien on the shares for a debt owing by a firm in which one of the trustees was a partner, which must prevail over the title of the *cestuis que trust* (a).]

* 7. A party, having a secret equity, who [* 716] Secret equity. stands by and permits the apparent owner to deal with others, as if he were the absolute owner and as if there were no such secret equity, shall not be permitted to assert such secret equity against a title founded upon such apparent ownership (b). *A fortiori* if the person having the secret equity be party to a document which assumes that there is no such equity, or on having notice of a purchaser's claim do not give information of the equity, so as to enable him to proceed against the person by whom he has been deceived (c). ["It is a principle of natural equity which must be universally applicable, that where one man allows another to hold himself out as the owner of an estate, and a third person purchases it for value from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title unless he can overthrow that of the purchaser by showing either that he had direct notice, or something which amounts to constructive notice, of the real title, or that there ex-

[(z) *Shropshire Union Railways and Canal Company v. The Queen*, 7 L. R. H. L. 496.]

[(a) *New London and Brazilian Bank v. Brocklebank*, 21 Ch. D. 302.] But see *Bradford Banking Company v. Briggs & Co.* 29 Ch. D. 149; reversed on appeal, W. N. 1885, p. 151; *Miles v. New Zealand Alford Estate Company*, W. N. 1885, p. 142.

(b) *Mangles v. Dixon*, 1 Mac. & G. 446, *per* Lord Cottenham; S. C. 3 H. L. Cas. 739, *per* Lord Truro; *Troughton v. Gitley*, Amb. (Blunt's ed.) 633, and cases cited, *Ib.* note (4); *Cornforth v. Pointon*, W. N. 1866, p. 189; [*Ex parte Bolland*, 9 Ch. D. 312; *Re Blachford*, W. N. 1884, p. 141.]

(c) *Mangles v. Dixon*, 1 Mac. & G. 447, 3 H. L. Cas. 740.

Canons laid
down in
Thornton v.
Ramsden.

isted circumstances which ought to have put him upon an inquiry that, if prosecuted, would have led to a discovery of it" (*d*).

8. The doctrines of the Court on this subject were much discussed in the case of *Thornton v. Ramsden* (*e*), and the following canons were laid down by the highest authorities in the House of Lords on appeal:—

a. If a stranger begins to build on land, *supposing it to be his own*, and the real owner, perceiving his mistake, abstains from setting him right, and leaves him to persevere in his error, a Court of Equity will not afterwards allow the real owner to assert his title to the land.

b. But if a stranger builds on land *knowing* it to be the property of another, equity will not prevent the real owner from afterwards claiming the land, with the benefit of all the expenditure upon it (*f*).

c. If a tenant builds on his landlord's land, he does [* 717] not, in the * absence of special circumstances, acquire any right to prevent the landlord from taking possession of the land and buildings when the tenancy has determined.

d. If the tenant, being a mere tenant at will, builds on the land in the *belief* that he thereby acquires a title afterwards to claim a lease of the land, and the landlord allows him so to build, *knowing* that he is acting in that belief, and does not interfere to correct the error, (*semble*) equity will interfere to compel the grant of a lease.

e. If a man, under a verbal agreement with a landlord for a certain interest in land, or under an expectation, created or encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation, with the *knowledge* of the landlord, and without objection by him, lays out money upon the land, a Court of equity will compel the landlord to give effect to such promise or expectation (*g*).

[*Willmott v.*
Barber.]

[9. The real ground upon which relief is given in

[*(d)* Per Jud. Com. Ramcoomar Koondoo *v.* Macqueen, L. R. Ind. App. Supp. vol. 40.]

[*(e)* 4 Giff. 519; 1 L. R. H. L. 129, *nom.* Ramsden *v.* Dyson; and see Bankart *v.* Tennant, 10 L. R. Eq. 141; [Plimmer *v.* Mayor, &c. of Wellington, 9 App. Cas. 699.]

[*(f)* See also Crampton *v.* Varna Railway Company, 7 L. R. Ch. App. 562.

[*(g)* See Plimmer *v.* Mayor, &c. of Wellington, 9 App. Cas. 699.]

these cases is fraud in the possessor of the legal right, and the elements necessary to constitute fraud of this description were enumerated by Fry, J., in a recent case (*h*), as follows:—

“(1). The plaintiff must have made a mistake as to his legal rights.

(2). The plaintiff must have expended some money, or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief.

(3). The defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff.

(4). The defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights (*i*).

(5). The defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money, or in the other acts which he has done, either directly or by abstaining from asserting his legal right.”]

10. The question who has the better equity frequently arises where estates, subject to a common charge, become vested in different owners, and each assignee endeavors to throw the charge upon the other.

* 11. It has been held in Ireland that if [* 718] there be an *express agreement* that one estate shall exonerate another from a judgment, a purchaser with notice of the agreement will be bound by it (*k*). And a covenant that the one estate is *free from incumbrances* or for *quiet enjoyment* will amount to such an agreement (*l*). Express agreement to exonerate from a judgment.

12. It has been further decided in Ireland that where A., the conusor of a judgment, settles an estate for valuable consideration, and afterwards sells an unsettled estate, the purchaser of the latter cannot have the judgment raised by a contribution from both estates (*m*); and even where a purchaser was not seeking relief against another purchaser, but the plaintiff was the judgment creditor seeking to have his debt raised, it Judgments as between two purchasers.

[*h*] Willmott v. Barber, 15 Ch. D. 96, 105; and see Weller v. Stone, 54 L. J. N. S. Ch. 497.]

[*i*] See as to this Plimmer v. Mayor, &c. of Wellington, 9 App. Cas. 699.

(*k*) Hamilton v. Royse, 2 Sch. & Lef. 315; Handcock v. Handcock, 1 Ir. Ch. Rep. 444.

(*l*) Handcock v. Handcock, 1 Ir. Ch. Rep. 444; and see *Re Roddy's Estate*, 11 Ir. Ch. Rep. 369; Aicken v. Macklin, 1 Dru. & Walsh, 621.

(*m*) Hartley v. O'Flaherty, Beat. 61; Ll. & G. t. Plunket, 208; and see *Re Roddy's Estate*, 11 Ir. Ch. Rep. 369.

was held that the whole onus must be borne by the subsequent purchaser (*n*); and the circumstance that the conveyance to the first purchaser contained a covenant against incumbrances or for quiet enjoyment does not appear, where it occurred, to have been the material ground on which the decision was rested (*o*). Neither did the Court distinguish the case where the subsequent purchaser had no notice of the prior charge. Indeed, in the leading case, the subsequent purchaser on whom the onus was thrown was apparently a purchaser without notice (*p*).

As between
settled and
unsettled
estates.

13. It has been further ruled in Ireland that where the conusor of a judgment settles an estate with a covenant against incumbrances, the purchasers under the settlement can throw the judgments on the unsettled estates as against subsequent judgment creditors, who had merely a general and roving lien, and did not stand in the place of specific purchaser (*q*), and even where the settlement was voluntary and without a covenant against incumbrances, it was ruled by the M. R. in Ireland that the owners of other estates devised by the settlor had no equity for contribution from the settled estate to pay off a judgment to which both settled and unsettled estates were subject at the date of the settlement (*r*). But on appeal the decision was reversed (*s*). [*719] * [So where estates were expressed to be settled for value, subject to charges amounting to 65,000*l.*, with a covenant against incumbrances except "the charges now existing thereon, amounting to the said sum of 65,000*l.*," and a power was reserved of further charging the property to a specific amount, which power was subsequently exercised, but the charges upon the estates at the time of the settlement in fact far exceeded 65,000*l.*, it was held that the purchasers under the settlement were entitled to be recouped the difference between the charges actually subsisting and the 65,000*l.*, in priority to the mortgagees under the power (*t*).]

(*n*) *Aicken v. Macklin*, 1 Dru. & Wal. 621.

(*o*) *Aicken v. Macklin*, 1 Dru. & Wal. 621; *Handcock v. Handcock*, 1 Ir. Ch. Rep. 444; and see *Hughes v. Williams*, 3 M. & G. 690; *Averall v. Wade*, Ll. & G. *t. Sugden*, 259.

(*p*) See *Hartley v. O'Flaherty*, Beat. 69.

(*q*) *Averall v. Wade*, Ll. & G. *t. Sugden*, 252; *Hughes v. Williams*, 3 Mac. & G. 683; and see *Re Roddy's Estate*, 11 Ir. Ch. Rep. 369.

(*r*) *Ker v. Ker*, 3 Ir. Rep. Eq. 489.

(*s*) 4 I. R. Eq. 15.

[(*t*) *Re Barker's Estate*, 3 L. R. Ir. 395.]

14. These principles, which have been acted upon in Ireland, will no doubt be followed to some extent in England. If, for instance, A., possessing Blackacre and Whiteacre [which are subject to a common incumbrance,] mortgages Blackacre to B., and covenants that it is free from incumbrances, this is a contract between A. and B., and every purchaser of Whiteacre with notice of the incumbrance and of the contract must be bound by the contract.

15. But if there be no express contract between A. and B., then the right of B. depends on a rule of equity, and as against A. himself it is clear that B. can insist on throwing the whole incumbrance on Whiteacre (*u*), and so as against any person claiming a general and roving lien only as a judgment creditor of A. (*v*); and even if A. afterward sell Whiteacre to C., who has notice of the incumbrance and the mortgage, there is no ground for saying that B. has not the like equity as against C., but if C. have no notice of the incumbrance or no notice of the mortgage, the Court will probably refuse to enforce the rule against him. At least Lord St. Leonards seems to have thought that the decisions in Ireland do not affect innocent purchasers—*i.e.* purchasers for valuable consideration without notice (*w*). And in the case of *Strong v. Hawkes* (*x*), L. J. Turner expressed a doubt whether the cases in Ireland had not gone to far

Rule in equity in absence of contract.

16. In *Barnes v. Racster* (*y*) a person mortgaged Foxhall to A., and then to B., and then Foxhall and No. 32 to A., and then Foxhall and No. 32 to C. All parties had notice of the prior transactions. It was held that B. could not compel A. to pay himself *ex-[*720] clusively out of No. 32, so as to leave B. the first incumbrancer on Foxhall, but C. was entitled to have the charges thrown proportionately upon Foxhall and No. 32.

Barnes v. Racster.

17. A purchaser of an equitable interest *specifically* has a higher equity than a person claiming under a *general* and *roving* charge as a judgment, and therefore the purchaser of such an equitable interest with-
Purchaser with notice

(*u*) See *Averill v. Wade*, Ll. & G. t. Sugden, 252.

(*v*) See *Averall v. Wade*, Ll. & G. t. Sugden, 252.

(*w*) *Vend. & P.* 746, 14th. ed.

(*x*) 4 De G. & J. 652, & MS.

(*y*) 1 Y. & C. C. C. 401; *Bugden v. Bignold*, 2 Y. & C. C. C. 377; and see *Re Lawder's Estate*, 11 Ir. Ch. Rep. 346; *In Re Mower's Trust*, 8 L. R. Eq. 110. As to the right of judgment creditors to marshall, *inter se*, see *Re Lynch's Estate*, 1 Ir. Rep. Eq. 396.

out notice of an equitable judgment was properly held not to be bound by it (z).

[Rule where specific charge on one property and general lien on another.]

[18. If there be a specific charge on one property to secure a sum of money, and there be a general lien on other property, (as for instance a banker's lien on his customer's securities in his hands), to secure the same sum, the property comprised in the specific charge must be primarily resorted to in exoneration of the property subject to the general lien (a).]

Where goods wrongfully pledged by a firm.]

19. The owner of goods which have been wrongfully pledged by a partnership firm to secure an advance to them, which is further secured by the guarantee of one of the partners, or by the deposit of partnership property, is entitled to have the securities marshalled and to have the benefit of the guarantee or a lien on the deposited property (b).]

SECTION II.

OF TESTAMENTARY DISPOSITION.

How trusts of freeholds to be devised.

1. An equitable interest in lands is transmissible by *devise* (c)¹. Indeed the old *use*, which preceded the trust, was devisable by *parol* previously to the Statute of Wills, 32 H. 8, c. 15 (d); but after that Act the trust by analogy to legal estates, became devisable only by will in *writing*.

Statute of Frauds.

2. The Statute of Frauds, 29 Car. 2, c. 3, followed, which required a devise of "lands" to be by a will, *signed* by the testator in the presence of and attested by *three witnesses*. This enactment was applied by the Courts to a devise of the equitable interest in lands. Otherwise a door would have been opened to [* 721] all the mischiefs and *inconveniences the Statute was intended to prevent (e). Whether trusts

(z) *Re Grady*, 13 Ir. Ch. Rep. 154. See *Wells v. Kilpin*, 18 L. R. Eq. 298.

[(a) *Re Dunlop*, 21 Ch. D. 583.]

[(b) *Ex parte Salting*, 25 Ch. D. 148; *Ex parte Alston*, 4 L. R. Ch. App. 168.]

(c) *Cornbury v. Middleton*, 1 Ch. Ca. 211, *per* Wyld, Just.; *Greenhill v. Greenhill*, 2 Vern. 679, *per* Lord Harcourt; *Philips v. Brydges*, 3 Ves. 127.

(d) *Shepp. Touch*, 407; and see *ante*, p. 611, note (1).

(e) *Wagstaff v. Wagstaff*, 2 P. W. 259, *per* Lord Macclesfield; *Adlington v. Cann*, 3 Atk. 151, *per* Lord Hardwicke; *Burgess v. Wheate*, 1 Eden, 224, *per* Lord Mansfield.

¹ *Clapper v. House*, 6 Paige, 149; *Kent v. Mehaffey*, 10 Ohio, St. 204; *Croxall v. Sherard*, 5 Wall. 268; *Reid v. Gordon*, 35 Md. 184; *Campbell v. Prestons*, 22 Gratt. 396.

were within the *letter* of the Act, or equity brought them under its operation by *analogy*, it is not easy to determine (*f*); but undoubtedly the word "lands" has often been extended to include trusts (*g*), and, if so, there seems to be little reason why trusts should not have fallen within the *express* terms of the Statute.

3. *Copyholds*, strictly speaking, are not at common law a devisable interest. A surrender is made to the use of the will, and the gift contained in the will operates as a declaration of the use. The devisee does not come in by the will, but by the surrender and the will taken together, as if the name had been inserted in the surrender himself (*h*). Thus copyholds at *law* were out of the Statute of Frauds, and might have been devised by a will neither signed nor attested; and as equity followed the law the trust of a copyhold was devisable in the same manner (*i*). And the equitable interest might always have been passed by will, though not preceded by a *surrender*, which previously to 55 G. 3, c. 192, was required to pass the *legal* estate (*k*).

Trusts of copyholds.

4. As equitable interests in copyholds were regulated by analogy to the custom affecting the legal estate, one might have supposed, that where the *legal* estate could not be devised, the *equitable* estate in like manner must have been left to descend. However, it was decided by the Court, that even assuming the absence of any power to devise the *legal* estate (*l*), the owner of the equitable estate could pass it by *will* (*m*). Whether the will must have been executed according to the Statute of Frauds, or whether any instrument sufficient for declaring the uses on a surrender would have been enough, does not sufficiently appear. But in a case of customary freeholds of which the legal estate could not be devised (and customary freeholds are

Where no custom to devise the legal estate of copyholds.

(*f*) See *Burgess v. Wheate*, *Wagstaff v. Wagstaff*, *ubi supra*; *Doe v. Danvers*, 7 East 322.

(*g*) See *supra*, p. 681.

(*h*) *Hussey v. Grills*, Amb. 800, *per* Lord Hardwicke.

(*i*) *Appleyard v. Wood*, Sel. Ch. Ca. 42; *Wagstaff v. Wagstaff*, 2 P. W. 258; *Tuffnell v. Page*, 2 Atk. 37; and see *Attorney-General v. Andrews*, 1 Ves. 225; but see *Anon. case*, cited *Wagstaff v. Wagstaff*, 2 P. W. 261.

(*k*) *Greenhill v. Greenhill*, 2 Vern. 679; *Tuffnell v. Page*, 2 Atk. 37; *Gibson v. Rogers*, Amb. 93.

(*l*) As to the validity of a custom restraining surrenders to the use of a will, see *Pike v. White*, 3 B. C. C. 286; and note 1, *Ib.*; *Doe v. Thompson*, 7 Q. B. 897.

(*m*) *Lewis v. Lane*, 2 M. & K. 449; *Wilson v. Dent*, 3 Sim. 385; [*Allen v. Bewsey*, 7 Ch. D. 453;] but see *Hussey v. Grills*, Amb. 299.

Of customary freeholds. now regarded as copyholds (*n*), Lord Hardwicke held that the reason why the *equitable* interest in copyholds [* 722] * could be advised by an unattested will, was because the *legal* estate of copyholds could be devised by an unattested will, and that as, in the case of customary freeholds before him, the legal estate could not be devised, the equitable interest could only pass by a will executed according to the *Statute of Frauds* (*o*). And *à fortiori* where a customary freehold, of which the legal estate was not devisable, was vested in a trustee upon such trusts as the *cestui que trust* should by will "to be by him *legally* executed" appoint, it was held that the equitable interest could not be devised by a will not executed according to the Statute of Frauds (*p*).

Late Wills Act. 5. By the late Wills Act (*q*), as to wills made on or after *1st January, 1838*, property, of whatever description, whether *real or personal*, freehold or copyhold legal or equitable, may be devised or bequeathed by a will in writing, signed by the testator in the presence of and attested by *two* witnesses, and by such a will only.

Revocation of wills by alteration of estate. 6. If, before this Act, a testator seised of an equitable estate in fee had devised it, and then disturbed the *equitable seisin* by executing a conveyance and taking back a new estate in the same property, the will was revoked in like manner as if the estate had been legal (*r*). But if a testator had devised an equitable estate and afterwards taken a conveyance so as merely to clothe the equitable estate with the legal, or was party to a conveyance for merely changing the trustees, such conveyances were not a revocation of the prior will (*s*). Now by the late Wills Act, a subsequent disturbance of the seisin, either at law or in equity, does not revoke the will (*t*).

(*n*) See *ante*, p. 248.

(*o*) *Hussey v. Grills*, Amb. 300. The whole argument in this case assumes that he will as opposed to the codicil was executed according to the Statute of Frauds, and yet the report states that the will was in writing, "but not attested according to the Statute of Frauds." The Reg. Lib. does not state whether the will was or not so executed. Amb. Blunt's edit.

(*p*) *Willan v. Lancaster*, 3 Russ. 108.

(*q*) 1 Vict. c. 26.

(*r*) *Lock v. Foote*, 5 Sim. 618; *Earl of Lincoln's case*, 1 Eq. Ca. Ab. 411; *S. C. Shower's P. C.* 154.

(*s*) *Doe v. Pott*, 2 Doug. 710; *Watts v. Fullarton*, cited Doug. 718; *Parsons v. Freeman*, 3 Atk. 741; *Dingwell v. Askew*, 1 Cox, 427; *Clough v. Clough*, 3 M. & K. 296.

(*t*) 1 Vict. c. 26, s. 23.

* SECTION III . [* 723]

OF SEISIN AND DISSEISIN.

1. THE term *seisin* is properly applicable to *legal* estates; but a Court of equity regards actual receipt of *seisin*. Equitable the rents and profits under the *equitable* title as equivalent to *seisin* at law, and has often adjudicated upon the rights of parties with reference to that circumstance.

Thus, in *Casborne v. Scarfe* (*u*), it was disputed, whether, as curtesy did not attach at law without a *seisin* in fact, the husband could claim his curtesy out of the wife's equity of redemption; but Lord Hardwicke said, "It is objected there is no *seisin* whatever of the legal estate in the wife in the consideration of law. But the true question is, if there was such a *seisin* or possession of the equitable estate in the wife, as in this Court is considered equivalent to an actual *seisin* of a freehold estate at common law; and I am of opinion there was: actual possession, clothed with the receipt of the rents and profits, is the highest instance of an *equitable seisin*, both of which were in this case." *Casborne v. Scarfe.*

2. And so it was held that there was *possessio fratris* of a trust, in other words, that if a person inherited a trust and died before actual *seisin* of the estate by receipt of the rents and profits, it should descend to the brother of the half blood, as heir to the father, in preference to the sister of the whole blood; but that if there had been such a receipt of the rents and profits as constituted equitable *seisin*, the sister of the whole blood, as heir to the brother, would exclude the brother of the half blood (*v*). *Possessio fratris.*

3. The doctrines of the Court upon the subject of equitable *disseisin* cannot be better illustrated than by a statement of the well-known case of *Marquis of Cholmondeley v. Lord Clinton* (*w*). The circumstances were briefly these:—George, Earl of Oxford, conveyed certain manors and hereditaments to the use of himself for life, remainder to the heirs of his body, remainder as he should by deed or will appoint, remainder to the right heirs of Samuel Rolle, with a power reserved of *Marquis of Cholmondeley v. Lord Clinton.*

(*u*) 1 Atk. 603; and see *Parker v. Carter*, 4 Hare, 413.

(*v*) See now 3 & 4 W. 4, c. 106.

(*w*) 2 Mer. 171; 2 J. & W. 1; and see *Penny v. Allen*, 7 De G. M. & G. 422.

Marquis v.
Cholmon-
deley v. Lord
Clinton.

revocation and new appointment. Some time after, the [* 724] Earl executed a mortgage in fee, which * operated in equity as a revocation of the settlement *pro tanto*. In 1791 the Earl died without issue and intestate, and upon his death the ultimate remainder (which had been a vested interest in the Earl himself, as the *heir of Samuel Rolle at the date of the deed*), should have descended to the right heir of the Earl, but, the parties mistaking the law, the person who was *heir of Samuel Rolle at the death of the Earl* was allowed to enter on the premises, and continued in possession, subject to the mortgage, up to the commencement of the suit. The bill was filed in 1812, by the assign of the right heir of the Earl against the mortgagee and the assign of the right heir of Samuel Rolle, for redemption of the premises, and an account of the profits. It was debated whether, as the legal estate was vested in the mortgagee, and the heir of Samuel Rolle had held the possession subject to a subsisting mortgage, the assign of the Earl's heir, to whom the equity of redemption belonged in point of *right*, had been disseised of his equitable interest, and was now barred by the effect of time. Sir W. Grant argued, that although there might be what was deemed a *seisin* of an equitable estate, there could be no *disseisin*—first, because the *disseisin* must be of the entire estate, and not of a limited and partial interest in it; and, secondly, because a tortious act could never be the foundation of an equitable title; that an equitable title might undoubtedly be *barred* by length of time but could not be *shifted* or *transferred* (x); that the equity of redemption subsisted, and it must therefore belong to some one, and could only belong to the original *cestui que trust* (y); that the *cestuis que trust* could only be barred by barring the trustee (z). Sir W. Grant did not then decide the point, but directed a case for the opinion of the Queen's Bench on a question of law, and retained the bill in the meantime.

Reheard.

The cause was afterwards reheard on the equity reserved before Sir T. Plumer, who determined that the original *cestui que trust* had been *disseised* and was consequently barred (a). "The grounds," he said "upon which it is contended that the holder of the rightful equity is not bound by *laches* and *non-claim* are that

(x) See *Hopkins v. Hopkins*, 1 Atk. 590.

(y) 2 Mer. 357-359.

(z) *Ib.* 361.

(a) 2 J. & W. 1.

the tortious possessor does not claim to be the holder of more than the equitable estate—that there is no *disseisin* abatement or intrusion of a trust—that the possessor is only tenant at will, and may be dispossessed at any time by the trustee of the legal estate, and he has *therefore only a precarious and permissive [*725] possession—that tortious possession can never be the foundation of an equitable title (*b*). But this reasoning” he continued, “proceeds on a mistaken view of the manner in which, and the grounds upon which, the bar from length of time operates. The question respects the plaintiff’s right to the remedy, not the defendant’s title to the estate. A tortious act can never be the foundation of a *legal* any more than of an *equitable* title. The question is, whether the plaintiff has prosecuted his title in due time (*c*). As to the argument that a title in a Court of equity may be *lost* by *laches*, but cannot be *transferred* without the act of the party, the case is the same in this respect both in equity and law. If the negligent owner has for ever forfeited by his *laches* his right to any remedy to recover, he has in effect lost his title for ever. The plaintiff is barred of his remedy; the defendant keeps possession without the possibility of being ever disturbed by any one: the loss of the former owner is necessarily his gain; it is more—he gains a positive title under the statute at law, and, by analogy, in equity (*d*). If the mere existence of an old legal estate would have the effect of preventing the bar attaching upon the equitable estate, all the principles that have been established respecting equitable estates and titles would be overturned. According to this reasoning, whenever the legal estate is outstanding, in an old term, for instance, to attend the inheritance, the earliest equitable title must in all cases prevail; quiet enjoyment for sixty, one hundred, or two hundred years or more, would be no security, if the old term had existed longer; it would always be open to enquiry in whom was vested the equitable title which originally existed when the old term was created” (*e*).

On appeal to the House of Lords his Honour’s decision was affirmed, and the principle on which it proceeded was approved. Lord Eldon said, “He could not agree, and had never heard of such a rule as that adverse possession, however long, would not avail

Appeal to the
House of
Lords.

(*b*) 2 J. & W. 153.

(*c*) *Ib.* 155.

(*d*) *Ib.* 155, 156.

(*e*) 2 J. & W. 157.

against an equitable estate: his opinion was, that adverse possession of an equity of redemption for twenty years was a bar to another person claiming the same equity of redemption, and *worked the same effect a abatement or intrusion with respect to legal estates and that for the quiet and peace of titles and the world it ought to have the same effect*" (f).

[* 726]

SECTION IV.

OF MERGER.

General rule.

1. At law merger is the necessary consequence of the union of two estates in the same person in the same right, but in equity two estates without any intervening interest may meet in the same person in the same right without merger, and, on the other hand, though the estates are separated by an intervening interest, merger may take effect. The principle by which the Court is guided is the *intention*; and in the absence of express intention, either in the instrument or by parol, the Court looks to the *benefit of the person in whom the two estates become vested* (g) ¹.

Purchase subject to charges.

2. The chief importance of the doctrine of merger is with reference to charges. Thus A., the owner of an estate subject to a first incumbrance in favour of B. and a second incumbrance in favour of C., contracts to sell the estate to D. Here, if the purchaser knows of both the incumbrances, he of course will not accept the title until they have been discharged. But should he have *actual* notice of the incumbrance to B. only, and take a conveyance from A. and B. so as to extinguish the charge of the latter, this act (if, by reason of his having constructive notice of C.'s incumbrance or otherwise, the defence of purchase for value without notice is not available) lets in the incumbrance of C. [* 727] as the first charge (h). If, * on the other

(f) *Ib.* 190, 191.(g) *Lord Compton v. Oxenden*, 2 Ves. jun. 264; *Forbes v. Mofatt*, 18 Ves. 390; *Horton v. Smith*, 4 K. & J. 630.(h) *Toulmin v. Steere*, 3 Mer. 210; *Medley v. Horton*, 14 Sim. 226; *Parry v. Wright*, 1 S. & S. 369, 5 Russ. 142; *Smith v. Phillips*, 1 Keen. 694; *Brown v. Stead*, 5 Sim. 535; *Mocatta v. Murgatroyd*, 1 P. W. 393. [The case of *Toulmin v. Steere*, *ubi sup.*¹ *Gardner v. Astor*, 3 Johns. Ch. 53; *Donald v. Plumb*, 8 Conn. 453; *Den v. Vanness*, 5 Halst. 102; *Hunt v. Hunt*, 14 Pick. 374.

hand, the purchaser, being apprehensive of some outstanding incumbrance, take an assignment of B.'s security to a trustee for him in order that it may be kept on foot, then the charge does not merge in the fee-simple; but should C. take proceedings for raising his charge, the purchaser may protect himself by the shield of B.'s incumbrance as the first charge (*i*)¹.

3. The same principle under different circumstances applies where B., the first incumbrancer, buys up the interest of the owner subject to the charge; for if the charge be not kept on foot the incumbrance of C. will be let in, unless the defence of purchase for value without notice be applicable (*k*).

Purchase by person entitled to the charge.

4. The vendor must not be put to extra expense by the form in which the purchaser wishes the conveyance to be made, and where the vendor is under a personal liability he may insist on being discharged from it, but with these qualifications the purchaser can insist on having charges kept up instead of being merged (*l*).

Purchaser may require the charge to be kept on foot.

5. If the purchaser desire to keep on foot a charge vested in himself, he should take a conveyance of the equity of redemption to a trustee, and the intention should be expressed on the face of the instrument, and if this be done the charge and the inheritance will both

Mode of keeping charge on foot.

has been doubted, and in the recent case of *Adams v. Angell*, 5 Ch. D. 634, 645, the late M. R. sitting in the Court of Appeal, while withholding his opinion as to whether it was binding in that Court, observed, "it amounts to no more than this, that in the case of a purchase from the owner of an equity of redemption in which the purchase-money is partly applied in paying off incumbrances, the purchaser with notice, whether actual or constructive, of other incumbrances is not, in the absence of any contemporaneous expression of intention, entitled as against the other incumbrancers, of whose securities he has notice, to say afterwards that the incumbrancers so paid off are not extinguished. It does not go beyond that, and there are several authorities which say that this doctrine is not to be carried further." And in a recent Indian appeal the Privy Council refused to apply the doctrine of *Toulmin v. Steere* to India on the ground that it did not rest on any broad intelligible principle of justice; *Gokuldoss Gupaldoss v. Rambux Seochand*, 11 L. R. Ind. App. 126.] As to *Greswold v. Marsham*, 2 Ch. Ca. 170, see *Dart* 917, 918, 5th edit. [*Gokuldoss Gopaldoss v. Rambux Seochand*, 11 L. R. Ind. App. 126, 130.] See also *Anderson v. Pignet*, 8 L. R. Ch. App. 180.

(*i*) *Watts v. Symes*, 16 Sim. 646, *per* V. C. Shadwell; *Smith v. Phillips*, 1 Keen, 699, *per* Lord Langdale; *Parry v. Wright*, 1 S. & S. 379, *per* Sir John Leach.

(*k*) *Parry v. Wright*, 1 S. & S. 369; 5 Russ. 142; *Garnett v. Armstrong*, 2 Conn. & Laws. 458.

(*l*) *Cooper v. Cartwright*, Johns. 679.

¹ *Cooper v. Cartwright*, 1 John. 679.

be sustained in equity so as to afford protection against any intervening incumbrance (*m*).

Merger on a contingency.

6. A purchaser may even have the charge assigned so as to keep it on foot in one event and merge it in another event, should the contingencies affecting the estate make such a course desirable (*n*).

A trustee not absolutely necessary.

7. The assignment should in prudence be made to a trustee, but if the purchaser have the equity of redemption conveyed to *himself*, yet if the intention to keep up the charge be clear, no merger will take place (*o*).

Getting in a charge pending contract for purchase.

8. If a person *contract* only for the purchase of an estate, and pays off a first charge with a view to the purchase but before the completion of it, no merger takes place, but the purchaser stands in the shoes of the first incumbrancer (*p*).

Where the person who created the second charge buys up the first charge.

9. The question of merger has been spoken of as one of *intention*, but this principle must not be applied [* 728] where a person has * himself created two successive incumbrances and then buys up the first charge, for in this case the mortgagor when he creates the second incumbrance is under a duty to discharge the debt previously incurred, and though the second mortgagee cannot compel him to do this, yet if the mortgagor do discharge the first debt, the second incumbrancer, whatever may have been the intention, will have the benefit of it. Besides, in most cases a mortgagor, in creating an incumbrance, enters into a covenant for further assurance, and this, independently of any general equity, would, it is conceived, give the incumbrancer a right to call for the assignment to him of any interest in the estate subsequently acquired by the mortgagor. Although, therefore, the mortgagor take an assignment of the prior charge to a trustee for himself to the intent that the same may be kept on foot, yet equity will not allow this as against the second incumbrancer (*q*).

Otter v. Vaux.

10. This has been carried so far that where a mortgage was made with a power of sale, and then a second incumbrance was created, and then the mortgagor purchased under the power of sale in the first mortgage, it was held that by this means the second incumbrance

(*m*) *Bailey v. Richardson*, 9 Hare, 736; and see *Holt v. Holt*, cited 1 P. W. 374.

(*n*) See *Selsey v. Lake*, 1 Beav. 146, 148.

(*o*) See *Davis v. Barrett*, 14 Beav. 542; *Forbes v. Moffatt*, 18 Ves. 384; *Earl of Clarendon v. Barham*, 1 Y. & C. C. C. 688; *Keogh v. Keogh*, 8 I. R. Eq. 179.

(*p*) *Watts v. Symes*, 1 De G. M. & G. 240.

(*q*) *Otter v. Lord Vaux*, 2 K. & J. 657, *per* V. C. Wood.

was let in as the first charge upon the estate (*r*). It was clear that if the mortgagor had paid off the first mortgage and taken a re-conveyance, this would have enured to the benefit of the second mortgagee; and the substance of the transaction was thought to be the same where the mortgagor took a re-conveyance from the mortgagee by the machinery of the power of sale: it was said that this gave the second incumbrancer a double security—first, the purchase money in the hands of the first mortgagee, and then the estate in the hands of the mortgagor; but the answer was that the mortgagee could get no more than he was entitled to, viz., his principal money and interest (*s*).

[11. But where the trustee in bankruptcy of the mortgagor purchased from the first mortgagee, it was held that the second mortgagee was unaffected by the transaction, that the trustee stood in the position of transferee of the mortgage, and the second mortgagee was entitled to redeem him upon the usual terms (*t*).]

[Trustee in bankruptcy buying up charge.]

12. It was observed by Sir William Grant (*u*) that the cases of *Greswold v. Marsham* (*v*) and *Mocatta v. Murgatroyd* (*w*) were express authorities to show that one purchasing an equity of * redemption could not [* 729] set up a prior mortgage of his own, nor consequently a mortgage which he had got in, against subsequent incumbrances of which he had notice. Now a person who borrows money cannot be his own creditor, or set up an incumbrance of his own as against his own creditor (*x*); and if the vendor of the equity of redemption be himself personally liable for the charge, the purchaser will, as a general rule, be bound to indemnify him, but that one purchasing an equity of redemption cannot set up a mortgage of his own, or one which he has got in, as against incumbrances not created by himself (a proposition not established by the authorities cited by Sir W. Grant (*y*)) is, it is conceived, not law at the present day (*z*). If the first mortgage be paid off and extin-

Owner of a charge may buy equity of redemption and hold his charge against an intervening incumbrancer.

(*r*) *Otter v. Lord Vaux*, 2 K. & J. 650.

(*s*) *Otter v. Lord Vaux*, 2 K. & J. 657.

[(*t*) *Bell v. Sunderland Building Society*, 24 Ch. D. 618.]

(*u*) *Toulmin v. Steere*, 3 Mer. 224.

(*v*) 2 Ch. Ca. 170.

(*w*) 1 P. W. 393.

(*x*) *Watts v. Symes*, 1 De G. M. & G. 244, *per* L. J. Knight Bruce.

(*y*) See *Watts v. Symes*, 1 De G. M. & G. 244; and *Dart. V. & P.* 917, 918, 5th edit.; [*Adams v. Angell*, 5 Ch. D. 634.]

(*z*) See now *Hayden v. Kirkpatrick*, 34 Beav. 645; *Stevens v. Mid-Hants Railway Company*, 8 L. R. Ch. App. 1064; [*Gokuldoss Gopaldoss v. Rambux Seochand*, 11 L. R. Ind. App. 126.]

tinguished, of course the second charge is let in; but subject to the equities flowing from the contract between the purchaser and his vendor, the first mortgage and the equity of redemption may be so vested in the same person as to keep the two separate, and so exclude the second incumbrance.

Effect of
keeping a
charge on
foot.

13. It must be borne in mind that where the charge and the inheritance do not merge, the person in whom they are vested has two distinct possessions, and in the absence of any indication of intention that the charge shall in equity wait upon and attend the inheritance, the charge will go to the executor, subject to probate and legacy duty (*a*), and the inheritance to the heir (*b*). The question, therefore, is constantly arising as between the real and personal representatives, whether the two interests merged in the lifetime of the person entitled to both or were subsisting at the time of his death; and the question of merger or non-merger is held to be an open one up to the death of the testator (*c*), and for the purpose of collecting the intention parol evidence is admissible (*d*).

Rule where
charge and
inheritance
become
united.

14. Where a person is entitled to a charge and to [* 730] the inheritance under the same instrument (*e*), or being first entitled to the charge subsequently acquires the inheritance as devisee (*f*), or heir (*g*), or being first entitled to the inheritance acquires the charge by bequest (*h*), or by succession as next of kin (*i*), in all these cases, in the absence of anything said or done by the owner of the charge and of the estate to show what his intention was (*k*), the Court presumes the

(*a*) See *Swabey v. Swabey*, 15 Sim. 502.

(*b*) *Belaney v. Belaney*, 2 L. R. Ch. App. 138; 35 Beav. 469. Lord Romilly, M.R., observed that "If the testator had died intestate altogether, and the question had arisen between the heir and the next of kin, I think the term would have gone to the heir." Is it meant by this that a charge cannot be kept up for the benefit of the next of kin, but only for the benefit of persons claiming under a will?

(*c*) *Swinfen v. Swinfen* (No. 3), 29 Beav. 199; and see *Tyrwhitt v. Tyrwhitt*, 32 Beav. 244.

(*d*) *Astley v. Milles*, 1 Sim. 298.

(*e*) *Grice v. Shaw*, 10 Hare, 76; *Richards v. Richards*, Johns. 754.

(*f*) *Forbes v. Moffatt*, 18 Ves. 384; *Earl of Clarendon v. Barham*, 1 Y. & C. C. 688; *Davis v. Barrett*, 14 Beav. 542.

(*g*) *Chester v. Willes*, Amb. 246; *Powell v. Morgan*, 2 Vern. 90; *Thomas v. Kemeys*, 2 Vern. 348.

(*h*) *Price v. Gibson*, 2 Eden, 115.

(*i*) *Donisthorpe v. Porter*, 2 Eden, 162; *Lord Compton v. Oxenden*, 2 Ves. jun. 260.

(*k*) See *Tyrwhitt v. Tyrwhitt*, 32 Beav. 244, in which Sir John Romilly, M.R., observed. "The three tests usually applied for the purpose of ascertaining whether the owner of the charge in-

charge to be merged or not according as merger would or not be for the owner's benefit. If, therefore, the owner would, as in the case of an infant previously to the late Wills' Act, have had a larger testamentary power over the charge than over the inheritance (*l*), or if the merger would let in subsequent or competing incumbrances (*m*) of substantial amount (*n*), or the debts of the testator or grantor (*o*), the Court presumes the intention to have been that the charge and the inheritance, though both vested in the same person, should be kept distinct. But if it clearly appear that to keep the charge on foot could in no way benefit the owner it will merge (*p*).

15. Where a charge is *paid off* by a person owning an interest in the property charged, the *quantum* of interest which he owns is, in the absence of direct evidence of intention, the chief guide in determining whether merger takes place. If he be *absolutely* entitled, the *presumption* is that he meant to free the property from the charge; if only *partially* interested, the *presumption* is that he intended to keep it on foot. Rule where owner pays off a charge.

16. Thus, if the person paying off the charge be *tenant in fee * simple*, the presumption will be [* 731] Tenant in fee simple paying off a charge. that the charge was meant to be merged (*q*), unless the assignment of the charge was to a trustee in trust for the owner of the inheritance, his "*executors, administrators and assigns*," instead of his "*heirs and assigns*" (*r*), or there were other circumstances in the transaction sufficient to exclude the presumption (*s*).

tended that it should merge in the inheritance at the time when he became entitled to the absolute interest in the charges are : 1. Any actual expression of that intention ; 2. Where the form and character of the acts done are only consistent with the keeping the charge on foot ; and 3. Such an intention may be presumed when, though a total silence in all other respects pervades the matter, it appears that it was for the interest of the owner of the charge that it should not merge in the inheritance."

(*l*) *Powell v. Morgan*, 2 Vern. 90; *Thomas v. Kemeye*, 2 Ib. 345; *Duke of Chandos v. Talbot*, 2 P. W. 601.

(*m*) *Forbes v. Moffatt*, 18 Ves. 384; *Earl of Clarendon v. Barham*, 1 Y. & C. C. C. 688; *Grice v. Shaw*, 10 Hare, 76; *Richards v. Richards*, *Johns*. 754; *Keogh v. Keogh*, 8 I. R. Eq. 179.

(*n*) *Richards v. Richards*, *Johns*. 767.

(*o*) *Davis v. Barrett*, 14 Beav. 552; *Sing v. Leslie*, 2 H. & M. 38.

(*p*) *Price v. Gibson*, 2 Eden, 115; *Donisthorpe v. Porter*, Ib. 162; *Lord Compton v. Oxenden*, 2 Ves. jun. 263; *Swinfen v. Swinfen*, (No. 3), 29 Beav. 199.

(*q*) *Hood v. Phillips* 3 Beav. 513; *Pitt v. Pitt*, 22 Beav. 294; *Gunter v. Gunter*, 23 Beav. 571; *Swinfen v. Swinfen*, (No. 3), 29 Beav. 199.

(*r*) *Gunter v. Gunter*, 23 Beav. 571; and see *Tyrwhitt v. Tyrwhitt*. 32 Beav. 244.

(*s*) *Keogh v. Keogh*, 8 I. R. Eq. 179.

The mere fact of taking the assignment to a *trustee* for the person paying off, though a material ingredient in the question of intention, is not alone enough to keep the charge on foot (*t*).

[And where a person, claiming to be the absolute owner of an estate, borrows money to pay off a mortgage, there being no intermediate incumbrance, the presumption is that he means to extinguish the charge (*u*).]

Tenant for life paying off a charge.

17. If the person paying off the charge be *tenant for life*, the Court considers that as his interest ceases with his death, he could never have meant that the charge should be extinguished instead of enuring to the benefit of his representatives (*v*);¹ and the same rule applies though the tenant for life be or become entitled (subject to remainders to his own issue which fail) to the ultimate reversion in fee (*w*). But even in the case of tenant for life, positive evidence may be given by parol that he meant to merge the charge (*x*).

Tenant in tail in possession and of age paying off a charge.

18. As *tenant in tail in possession*, if of age, has an absolute power of disposition over the estate, subject to his compliance with certain forms, the presumption is, that if he pay off a charge he meant to merge it (*y*).

Special cases where charge has been kept on foot.

19. But if *tenant in fee-simple*, subject to an *executory limitation* over, which he cannot destroy (*z*), or a *tenant in tail* under an *Act of Parliament*, who is incapable of acquiring the fee-simple (*a*), or *tenant in tail in remainder* during the existence of the tenant [** 732*] for ** life* whose issue, if any, will be prior tenants in tail (*b*) pay off a charge, in all these cases, as the interest of the party required the charge to be kept on foot, the presumption is that such was the intention. And where a tenant in tail paid off a charge with the inten-

(*t*) *Pitt v. Pitt*, 22 Beav. 294; *Hood v. Phillips*, 3 Beav. 513.

[(*u*) *Mohesh Lal v. Mohunt Bawan Das*, 10 L. R. Ind. App. 62.]

(*v*) *Pitt v. Pitt*, 22 Beav. 294; *Burrell v. Earl of Egremont*, 7 Beav. 205; *Redington v. Redington*, 1 B. & B. 131; *Faulkner v. Daniel*, 3 Hare, 217; *Lindsay v. Earl Wicklow*, 7 I. R. Eq. 192.

(*w*) *Wyndham v. Earl of Egremont*, Amb. 753; *Trevor v. Trevor*, 2 M. & K. 675.

(*x*) *Astley v. Milles*, 1 Sim. 298.

(*y*) *St. Paul v. Dudley*, 15 Ves. 173; *per Lord Eldon*; *Jones v. Morgan*, 1 B. C. C. 206; *Earl of Buckinghamshire v. Hobart*, 3 Sw. 199; *Keogh v. Keogh*, 8 I. R. Eq. 179.

(*z*) *Drinkwater v. Combe*, 2 S. & S. 340.

(*a*) *Shrewsbury v. Shrewsbury*, 3 B. C. C. 120; *S. C.* 1 Ves. jun. 227; see *Earl of Buckinghamshire v. Hobart*, 3 Sw. 200.

(*b*) *Wigsell v. Wigsell*, 2 S. & S. 364; *Horton v. Smith*, 4 K. & J. 624.

¹ *State v. Kock*, 47 Mo. 582.

tion of extinguishing it *believing* himself to be tenant in fee-simple, and assuming that as the basis of the transaction, the Court considered, on the ground of *mistake*, that the tenant in tail had not merged the charge (c).

20. It seems to be settled that where a tenant for life or tenant in tail in remainder pays off a charge, and afterwards the fee devolves on the tenant for life, or the remainder of the tenant in tail vests in possession, this subsequent union of the charge and the inheritance is not *per se* sufficient to rebut the intention previously shown to keep the charge on foot (d).

Payment of charge and subsequent acquisition of fee.

21. If a person having both a subsisting charge and the estate mortgage or convey the latter, without mention of the charge, the security carries with it all the mortgagor's interest, and as between the mortgagor and mortgagee there is a merger (e). If tenant in fee of an estate mortgage it to the trustees of his settlement to secure a fund to which he is absolutely entitled, subject to a life interest limited to his wife, and then dies in the lifetime of the wife there can be no merger, for during the existence of the wife's interest the trustees could not, without a breach of trust, release the charge to him (f)¹.

Mortgage by person who has bought up a charge.

22. As charges are not unfrequently assigned like terms of years upon trust to *attend the inheritance*, it may be useful to add some cautionary remarks. So far as the author is aware, there is no authority for saying that charges can be made to wait upon the inheritance like terms of years. No doubt charges, like heirlooms and other personalty, can be settled to a certain extent to run in the channel of realty, but can they be impressed with the nature of realty itself? Thus A. buys an estate, and settles it by the purchase deed to the use of himself for life, with remainder to his first and other sons in tail, with remainder over to B., and suspecting secret incumbrances has a charge assigned to a trustee upon trust to attend the inheritance; A. dies, leaving an only son, who shortly afterwards dies without issue,

Whether charges can be made to attend the inheritance.

(c) *Earl of Buckinghamshire v. Hobart*, 3 Sw. 186; *Kirkham v. Smith*, 1 Ves. 258.

(d) *Trevor v. Trevor*, 2. M. & K. 675; *Wigsell v. Wigsell*, 2 S. & S. 364; *Horton v. Smith*, 4 K. & J. 624.

(e) *Tyler v. Lake*, 4 Sim. 351; *Johnson v. Webster*, 4 De G. M. & G. 474.

(f) *Wilkes v. Collin*, 8 L. R. Eq. 338.

¹ If a leasehold is held by a wife in her own right, but is in the occupation of her husband and he purchases the reversion, there is no merger. *Clark v. Dennison*, 33 Mo. 85.

[* 733] when the estate becomes * vested in B. An incumbrancer now starts up, and the charge is raised. Who is to have the benefit of it? Not, it will be said, A.'s real or personal representative, for by the trust he has parted with the absolute interest in favour of others. Not B., for how can personal estate go after an entail to a remainderman. The practice of assignment of charges, however, is so prevalent that when the point comes to be decided, the Court *may* go the whole length of holding that charges can attend the devolution of real estate through all its changes, and that they are not barred, &c., and that though latent before, yet they resume their vitality when a secret incumbrance is disclosed. The point must at present be considered an open one.

36 & 37 Vict.
c. 66, s. 25.

23. Now by a recent Act, 36 & 37 Vict. c. 66, s. 25, sub-s. 4, there is not any merger by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity.

SECTION V.

OF DOWER AND CURTESY.

Dower and
curtesy of a
trust.

1. A trust or equitable interest (*g*) and equity of redemption (*h*), of *freeholds*, were until the late Act (*i*)¹, exempt from the *lien* of dower; but were subject to the

(*g*) *Colt v. Colt*, 1 Ch. Rep. 254; *Bottomley v. Lord Fairfax*, Pr. Ch. 336; *Attorney-General v. Scott*, Cas. t. Talb. 138; *Chaplin v. Chaplin*, 3 P. W. 229; *Shepherd v. Shepherd*, Id. 234, note (D); *Lady Radnor v. Rotherham*, Pr. Ch. 65, *per* Lord Somers; *Godwin v. Winsmore*, 2 Atk. 525. The distinction taken by Sir Jos. Jekyll in *Banks v. Sutton*, 2 P. W. 700, between trusts created by the husband himself, and trusts originating from a stranger, has been overruled by subsequent cases; see *Curtis v. Curtis*, 2 B. C. C. 630; *D'Arcy v. Blake*, 2 Sch. & Lef. 391; *Burgess v. Wheate*, 1 Eden, 197.

(*h*) *Dixon v. Saville*, 1 B. C. C. 326; *Reynolds v. Messing*, cited 1 Atk. 604; *Casborne v. Scarfe*, 2 J. & W. 194.

(*i*) 3 & 4 W. 4, c. 105.

¹ Under the statutes and decisions of the several States, it is believed that everywhere except in Maine and Massachusetts the wife is dowable in the equitable as well as the legal estates of her husband. An alien can have no dower. *Shanks v. Dupont*, 3 Pet. 246; see *Mick v. Mick*, 10 Wend. 379.

curtesy of the husband (*k*), unless the husband was an alien (*l*)¹.

2. An equitable interest in *copyholds* (as the late Freebench. Act does not apply to them (*m*)) remains as before not subject to freebench (*n*).

3. With respect to *curtesy*, as at *law* the wife, to entitle her * husband to curtesy, must have *seisin* [* 734] in deed of the freehold (*o*), the question arises whether in the instance of a *trust*, there must not be such a *seisin* of the equitable estate in the wife as is considered equivalent to legal *seisin*, as actual possession of the estate clothed with the receipt of the rents and profits. What seisin required to give curtesy.

4. It seems to be admitted that if the equitable interest be in the possession of a stranger, *adversely to the right of the wife*, there is no such seisin in deed as to entitle the husband to his curtesy (*p*). No curtesy where there is adverse possession.

5. But if money be articulated or directed by will to be laid out in a purchase of *land to be settled on a married woman* in fee or in tail, the husband is entitled to curtesy, though no rent or interest may have been actually paid during the coverture (*q*). This proceeds Executory trusts.

(*k*) *Chaplin v. Chaplin*, 3 P. W. 234, *per* Lord Talbot; *Attorney-General v. Scott*, Cas. t. Talb. 139, *per eundem*; *Watts v. Ball*, 1 P. W. 108; *Sweetapple v. Bindon*, 2 Vern. 536; *Cunningham v. Moody*, 1 Ves. 174; *Casborne v. Scarfe*, 1 Atk. 603; *Dodson v. Hay*, 3 B. C. C. 405.

(*l*) See *Dumoncel v. Dumoncel*, 13 Ir. Eq. Rep. 92. But see now 33 Vict. c. 14, s. 2.

(*m*) See p. 738.

(*n*) *Forder v. Wade*, 4 B. C. C. 521.

[*o*] The seisin in deed of the freehold is necessary only in the cases in which, in the language of Lord Coke, "it may be attained unto;" Co. upon Litt. 29a., but where there are no possible means by which the seisin in deed can be acquired, the husband will be entitled to curtesy notwithstanding its absence, for *impotentia excusat legem*. Thus in the case put by Lord Coke, "a man seised of an advowson or rent in fee hath issue a daughter, who is married, and hath issue and dieth seised, the wife, before the rent became due or the church became void, dieth, she had but a seisin in law, and yet he shall be tenant by the curtesy, because he could by no industry attain to any other seisin," Co. upon Litt. 29a. So where a testator devised an estate to his daughter, her heirs and assigns, for her separate use, and the daughter died in the lifetime of the testator leaving a husband and an only child, it was held that under the operation of the Wills Act the husband was entitled to curtesy, and that as there were no possible means by which the husband could have obtained seisin in the wife's lifetime, it was not required, *Eager v. Furnivall*, 17 Ch. D. 115.]

(*p*) *Parker v. Carter*, 4 Hare, 413.

(*q*) *Sweetapple v. Bindon*, 2 Vern. 536; *Dodson v. Hay*, 3 B. C. C. 405.

¹ *Reese v. Waters*, 4 W. & S. 145.

on the principle that the *laches* of the trustees shall not prejudice the right of a third person, and, therefore, the claim to curtesy arises in the same manner as if the trustees had actually laid out the money in land and put the parties in possession.

Parker v.
Carter.

6. And it has been held, that in the case of an ordinary trust *any seisin* of the wife, though she has not possession or receipt of rents, is sufficient to entitle the husband to curtesy. Thus an estate had been vested in trustees upon trust for Carter, during the *joint* lives of himself and Mary his wife, and upon the death of *either* of them, and in default of appointment, upon trust for the children in fee. There were two children, a son and a daughter Elizabeth, and the daughter married Parker; Carter died in 1817, and on his decease the widow, although she had no life estate, held possession of the estate until her own death in 1839. Elizabeth Parker died in 1836, and the question was, whether Parker the husband was tenant by the curtesy, although his wife had never been in receipt of rents, The Vice-Chancellor ruled, that the possession of Carter was the possession of his trustee, and gave [*735] to the trustee a seisin of the * inheritance; that the death of Carter did not interrupt that seisin, but the trustee was still in actual possession, not by a new title then for the first time accruing, but by continuance of the seisin acquired during the coverture: that the trustee was in such possession for the benefit of the party lawfully entitled thereto, and that he continued in such possession until the entry of Mary, which might be supposed to be a month or more after the death of her husband, and that such interval, there being no adverse possession, would entitle the husband to his curtesy (*r*).

Curtesy
where there
is separate
use.

7. If the trust be for the *separate use* of the wife, so that her *seisin* would not entitle her husband to the possession or profits, it was formerly doubted whether in this case curtesy was not excluded. Lord Hardwicke was originally in favour of the curtesy (*s*); but in a subsequent case (without any allusion, however, to his former opinion), he decided against the claim of the husband (*t*). It has since been determined that the husband is entitled (*u*).¹

(*r*) Parker v. Carter, 4 Hare, 400; see Casborne v. Scarfe, 1 Atk. 606.

(*s*) Roberts v. Dixwell, 1 Atk. 609.

(*t*) Hearle v. Greenbank, 3 Atk. 715, 716.

(*u*) Morgan v. Morgan, 5 Mad. 408; Follett v. Tyler, 14 Sim.

¹ Tillinghast v. Coggeshall, 7 R. I. 383.

[The right of the husband will however be defeated by a disposition by the wife of her inheritance by act *inter vivos* or by will (v).] [Defeated by a disposition by the wife.]

8. It was observed by Sir John Leach that at law the husband could not be excluded from the enjoyment of property given to or settled upon the wife, but in equity he might, and that not only partially, as by a direction to pay the rents and profits to the separate use of his wife during coverture, but wholly, by a direction but this doctrine may admit of question, as there *should not be entitled to be tenant by the curtesy (w); descend to the heir of the wife, and that the husband that upon the death of the wife the inheritance should* appears no reason why a person should be able to exempt equitable any more than legal estates from the ordinary incidents of property. A declaration, for instance, by a settlor, that a trust should be inalienable or not available to creditors would be absolutely void. In the case of *Bennet v. Davis* (x), which is cited by Sir J. Leach for his position, the question discussed was not whether curtesy attached on an equitable estate but whether an equitable estate arose. A testator had devised lands "to his daughter, the wife of Bennet, for her *separate use*, exclusive of her husband, to * hold the same to her and her heirs, and that [* 736] her husband should not be tenant by the curtesy, nor have the lands for his life in case he survived, but that they should upon his wife's death go to her heirs. It was contended that the wife could not be a trustee for herself, and that the husband could not be a trustee for the wife, they both being one person, and, that consequently, as there was no trustee, the husband was entitled to the estate beneficially. But the Court held that the husband was a trustee for the wife, and observed, "though the husband might be tenant by the curtesy (viz., of the legal estate), yet he should be but a trustee for the *heirs* of the wife." The remark certainly implies that on the death of the wife the husband would not be tenant by the curtesy of the equitable estate, but that question had not been adverted to at the bar, and apparently, from the context, was not under the consideration of the Court. Even assuming the remark to have been made advisedly, the view of

125; *Appleton v. Rowley*, 8 L. R. Eq. 139; [*Cooper v. Macdonald*, 7 Ch. D. 288;] But see *contra*, *Moore v. Webster*, 3 L. R. Eq. 267.

[(v) *Cooper v. Macdonald*, 7 Ch. D. 288.]

(w) *Morgan v. Morgan*, 5 Mad. 411.

(x) 2 P. W. 316.

the Court may have been that the curtesy of the husband was excluded on the ground now overruled, viz., that the trust being not simply for the wife and her heirs but during the coverture for the separate use of the wife, and after her death for her heirs, there was not a sufficient seisin as regarded the husband for the curtesy to attach upon (y).

[Effect of Married Women's Property Act, 1882.]

[9. Under the Married Women's Property Act, 1882, a married woman is enabled to acquire, hold, and dispose of property as her separate estate as if she were a feme sole, without the intervention of any trustee, and the question has been suggested whether a husband can become entitled to curtesy out of property which the wife has acquired as separate estate under the Act. It is conceived that, in the event of the wife not otherwise disposing of the property, he will be entitled to his curtesy in the same manner as if the property had independently of the Act been settled for the separate use of the wife (z).]

Distinction between dower and curtesy.

10. It must be acknowledged, that as dower and curtesy stand exactly on the same footing upon principle, either the rejection of dower, or the admission of curtesy, was an anomaly. Some high authorities, as Lord Talbot (a), Sir T. Clarke (b), and Lord Loughborough (c), regarded the allowance of *curtesy* as the exception; and the ground upon which they proceeded [* 737] was that as trusts followed *the likeness of the use, and there was no curtesy of the use, there could be none of the trust. On the other hand, Sir J. Jekyll (d), Lord Hardwicke (e), Lord Cowper (f), Lord Mansfield (g), Lord Henley (h), and Lord Redesdale (i), thought that consistency would be restored by the admission of the title to *dower*; for, since the Statute of Frauds, they argued the system of trusts had undergone considerable alteration, and was conducted upon a much more liberal footing: the rule now was,

(y) See *Hearle v. Greenbank*, 3 Atk. 715, 716; *Morgan v. Morgan*, 5 Mad. 408.

[(z) 45 & 46 Vict. c. 75. See as to the effect of the Act, *infra* p. 751, *et seq.*]

(a) *Chaplin v. Chaplin*, 3 P. W. 234; *Attorney-General v. Scott*, Cas. t. Talb. 139.

(b) *Burgess v. Wheate*, 1 Eden, 196—198.

(c) *Dixon v. Saville*, 1 B. C. C. 327.

(d) *Banks v. Sutton*, 2 P. W. 713, 714.

(e) *Casburne v. Casburne*, 2 J. & W. 200.

(f) *Watts v. Ball*, 1 P. W. 109.

(g) *Burgess v. Wheate*, 1 Eden, 224.

(h) *Ib.* 249—251.

(i) *D'Arcy v. Blake*, 2 Sch. & Lef. 388.

that, as between the *cestui que trust* and the trustee and all claiming by or under them, whoever would have a right against the legal estate had a like right against the equitable. Thus either argument had a fair show of reason to support it; but the latter view was, no doubt, more in harmony with the system of trusts as eventually established.

The Courts, according to Lord Redesdale, were led to refuse dower out of trust estates from a well-founded fear of affecting the titles to a large proportion of the estates in the country, because parties had been acting on the footing that dower did not attach to a trust; but the same objection did not apply to allowing *tenancy by the curtesy*, inasmuch as no person would purchase an estate without the concurrence of the husband (*k*).

How curtesy came to be allowed and not dower.

11. By a late Act (*l*), the widow is entitled to dower *in equity* where the husband dies beneficially entitled to any interest (not conferring a title to dower at law) which whether wholly equitable, or partly legal and partly equitable, is an estate of inheritance in possession, or equal to an estate of inheritance in possession, other than an estate in joint tenancy (*m*). But in either case the wife will not be entitled to dower out of any property absolutely disposed of by the husband in his lifetime or by will (*n*). And by the Act a widow is not entitled to dower out of any land, when in the deed of conveyance thereof to her husband, or in any deed executed by him, it shall be declared that his widow shall not be entitled to dower (*o*). And the widow's right of dower may also be barred by declaration contained in the husband's will (*p*).

Late Dower Act.

* 12. The Act does not extend to the dower [** 738*] of any widow married *on or before the 1st January, 1834* (*q*), and does not apply to *copyholds* (*r*), though it does to lands of *gavelkind* tenure (*s*).

Exceptions from Act.

13. The ordinary *uses to bar dower* vest in the husband — Dower uses no bar to

(*k*) *D'Arcy v. Blake*, 2 Sch. & Lef. 388.

(*l*) 3 & 4 W. 4, c. 105.

(*m*) *Ib.* sect. 2.

(*n*) 3 & 4 W. 4, c. 105, sect. 4. But whether the husband has devised his estate in such a way as to manifest an intention that the estate should be free from dower, is a question often of great nicety. See *Gibson v. Gibson*, 1 Drew. 42; *Lacey v. Hill*, 19 L. R. 346, and Lord St. Leonards on Real Property Statutes, p. 254.

(*o*) 3 & 4 W. 4, c. 105, sect. 6.

(*p*) *Ib.* sect. 7.

(*q*) 3 & 4 W. 4, c. 105, sect. 14.

(*r*) *Powdrell v. Jones*, 2 Sm. & G. 407; *Smith v. Adams*, 5 De G. M. & G. 712.

(*s*) *Farley v. Bonham*, 2 J. & H. 177.

widow
married
since the
Act.

*Intent to bar
dower ex-
pressed in
deed dated
before the Act
inoperative.*

Dower out of
equitable fee
subject to
executory
divise.

band the whole inheritance in possession, partly at law and partly in equity, and therefore, *in the absence of declaration by him to the contrary*, must confer on a widow, *married after the Act*, a right to dower (*t*).

14. And if an estate was conveyed *before the Act* to uses in bar of dower with words expressing the *intent* of the limitations to be to prevent any wife of the purchaser from becoming dowable, such words cannot amount to a declaration under the Act (*u*); and, if they did, the deed, as being executed before 1st January, 1834, could not prejudice any right of dower (*v*); and consequently the widow married after the Act will, in such a case, be dowable (*w*).

15. And a widow married since the Act is dowable of an *equitable estate* limited to the husband in fee, but subject to a *limitation over* on his dying without issue living at his death and which event has since occurred (*x*).

SECTION VI.

OF THE ESTATE OF A FEME COVERT CESTUI QUE TRUST.

UNDER the above title we propose, *First*, To advert shortly to the effect of marriage upon property, held upon trust for a *feme covert* simply, and not for her separate use, treating, in order, of pure personalty, chattels real, and real estate of freehold or inheritance; and, *Secondly*, To consider the nature of a wife's *separate estate* (*y*).

First. Of a *feme covert's* equitable interest generally.

[And here we may observe, that the mutual rights of husband and wife in the property of the wife have recently undergone such great changes, that it will be well, for the sake of simplicity, to deal separately with (A), the law as regards cases not affected by the [* 739] * Married Women's Property Act, 1882, and (B), the modifications introduced by that Act.

(*t*) Fry v. Noble, 20 Beav. 602.

(*u*) Fry v. Noble, 7 De G. M. & G. 687.

(*v*) Fry v. Noble, 20 Beav. 598, *per* M. R. relying on sect. 14.

(*w*) Fry v. Noble, 20 Beav. 598; 7 De G. M. & G. 687; Clarke v. Franklin, 4 K. & J. 266.

(*x*) Smith v. Spencer, 2 Jur. N. S. 778.

(*y*) This section in the third and fourth editions was added to and much improved by the author's friend, the late Mr. F. O. Haynes.

(A.) As to the cases not affected by the Married Women's Property Act.

The cases to be considered under this head will be confined to those in which property accrued before the 1st January, 1883, to women who were married before that date.]

1. As respects *pure personal estate* (by which expression is meant personalty *exclusive of chattels real*, such as chattels personal, legacies, and other *choses en action*), not settled to the wife's separate use, the husband's power over the *equitable* estate is regulated by his power over the *legal* estate. A personal chattel, as furniture, held in trust for the wife, belongs in equity to the husband absolutely. But as to *choses en action*, as legacies, the right of the husband depends upon the fact of *reduction into possession* (z). If the wife's equitable interest be a present one, and the trustee is willing to facilitate the reduction into possession by payment, transfer, &c., to the husband, the trustee is at liberty to do so, and will not thereby incur any personal responsibility (a). On the other hand, the trustee, in whose hands the wife's *chose en action* is, may, in a proper case, insist on having it settled; and if for that purpose he pay it, by arrangement with the husband, to the trustees of an existing settlement, to be held by them upon the trusts thereof, such settlement will be as valid as if made by the Court (b). But a wife has no *equity to a settlement* until her *antenuptial debts* have been discharged (c); and she has no such equity against a *purchaser* where the fund has been aliened by the husband, and the alienation is binding on the wife from her having taken a *fraudulent* part in the alienation (d).

Pure personal estate not settled to separate use.

An actual reduction into possession (e)¹ is required

Reduction into possession.

(z) *Purdew v. Jackson*, 1 Russ. 45, 46.

(a) See *Re Swan*, 2 H. & M. 37.

(b) *Montefiore v. Behrens*, 1 L. R. Eq. 171. In this case M. R. speaks of the wife's right to have it settled as *she pleased*, but as to the wife's capacity, see *Re Swan*, 2 H. & M. 37; and see *Re Robert's Trust*, 38 L. J. N. S. Ch. 708.

(c) *Barnard v. Ford*, 4 L. R. Ch. App. 247; *Miller v. Campbell*, W. N. 1871, p. 210.

(d) *Re Lush's Trust*, 4 L. R. Ch. App. 591; [*Cahill v. Cahill*, 8 App. Cas. 437; *S. C. nom. Cahill v. Martin*, 5 L. R. Ir. 227, 7 L. R. Ir. 361.]

[(e) As to the circumstances under which a lodgment in Court of a *chose en action* belonging to the wife will amount to a reduction into possession, see *Donnelly v. Foss*, 7 L. R. Ir. 439.]

¹ A suit brought in name of husband and wife is not a reduction to possession, *Pike v. Collins*, 33 Me. 43; *Arnold v. Rug-*

* 26 LAW OF TRUSTS.

for defeating the wife's rights (*f*); and in the absence of reduction into possession by the husband during his [* 740] life, the equitable interest passes * to the wife by survivorship (*g*). It follows that where the wife's interest remains *reversionary* until after the husband's death, and the wife survives, she *necessarily* takes by survivorship (*h*). And so if the marriage be dissolved, or a judicial separation be decreed (*i*), [or a protection

[*(f)* A release by the husband of a *chose en action* payable *in presenti* is effectual to bar the wife's equity to a settlement, and if the release be of a legacy by deed poll it will be operative although there was no legal personal representative in existence at the time of its execution; and the release is good although the husband was living apart from the wife and not contributing to her support, *McCreery v. Searight*, 5 L. R. Ir. 206, 641; *Harrison v. Andrews*, 13 Sim. 595; see Roper on Husb. & Wife, vol. 1, p. 240 *et seq.*]

[*(g)* If the husband and wife appoint an agent to receive a *chose en action* of the wife, and he receives it, but does not pay it over to either husband or wife, his receipt nevertheless operates as a reduction into possession by the husband, *Huntley v. Griffith*, F. Moore, 452, Goldsborough, 2nd ed. p. 159, pl. 91; and this will also be the case, where the *chose en action* is the distributive share of the wife in the estate of an intestate of which she is the administratrix, *Re Barber*, 11 Ch. D. 442. If the wife with the assent of her husband receives a *chose en action*, it operates as a reduction into possession by him, *Rogers v. Bolton*, 8 L. R. Ir. 69; but the payment to the wife without the husband's assent will not prevent the husband, if he survive her, from suing for the *chose en action* as her legal personal representative, S. C.]

[*(h)* *Purdew v. Jackson*, 1 Russ. 1; *Honnor v. Morton*, 3 Russ. 65. [In *Widgery v. Tepper*, 5 Ch. D. 516, affirmed 7 Ch. D. 423, a husband sold his wife's share as one of the next of kin of an intestate in certain chattels and received the purchase money for her share. After the husband's death, which occurred in the wife's lifetime, it was discovered that the sale had taken place under circumstances which it was contended rendered it voidable, and on the question as to who was entitled to take proceedings to set the sale aside, it was held that the right to do so was in the husband's representatives and did not survive to the wife.]

[*(i)* [*Wells v. Malbon*, 31 Beav. 48;] *Re Insole*, 35 Beav. 92; *Prole v. Soady*, 3 L. R. Ch. App. 220; *Johnson v. Lander*, 7 L. R. Eq. 228; *Heath v. Lewis*, 4 Giff. 665; *Swift v. Wenman*, 10 L. R. Eq. 15; and see *Fussell v. Dowding*, 14 L. R. Eq. 421; 27 Ch. D. 237; *Jessop v. Blake*, 3 Giff. 639; *Fitzgerald v. Chapman*, 1 Ch. D. 563.

gles, 1 R. I. 165; a judgment or decree in such proceedings is not enough; *Pike v. Collins*, 33 Me. 43; *Mason v. M'Neil*, 23 Ala. 201; there should be execution and an actual delivery of the property to the husband or his agent, *id.*; a joint receipt is not sufficient; *McDowell v. Potter*, 8 Barr. 191; *Timbers v. Katz*, 6 Watts & S. 29. If wife's land be sold and notes to husband's order be taken in payment they are his; *Barber v. Slade*, 30 Vt. 191; *Taggart v. Boldin*, 10 Md. 104; see *Perry on Trusts* (3rd ed., § 639).

order be obtained (*k*)] before the *chose en action* is got in, it belongs to the wife. A similar principle applies, where the interest of the wife may be viewed as partly possessory and partly reversionary,—as where the wife is entitled during her own life; in which case, the husband cannot bind the interest of the wife beyond the duration of the coverture (*l*). So, even if the husband assign the wife's reversionary interest, and it subsequently, *during the husband's lifetime*, becomes possessory, the wife's right by survivorship remains, unless reduction into possession be actually effected by the husband in his lifetime (*m*).

2. The *equity to a settlement* appears to have had its origin (*n*) in cases where the trustee, declining to pay, transfer, &c., the *wife's possessory interest* to the husband, and the husband filing a bill against the trustee to compel *payment, transfer, &c.*, the Court held that those who seek equity must do equity; and declined to assist * the husband in obtaining the wife's [* 741] equitable interest, except upon the terms of some portion of it being settled for the benefit of the wife and her issue.¹ Equity to a settlement.

[But where property is given to husband and wife, inasmuch as by the unity of the persons in law they take by entirety, and the husband is entitled in his own right to the entirety during his life, the wife will have no equity to a settlement out of any part of the property (*o*).

3. Whatever may have been the source of this equity, Feme may assert her

[(*k*) *Re Coward and Adam's Purchase*, 20 L. R. Eq. 179; *Nicholson v. Drury Buildings Estate Company*, 7 Ch. D. 48; *Re Emery's Trusts*, 50 L. T. N. S. 197; 32 W. R. 357.]

(*l*) *Stiffe v. Everitt*, 1 M. & Cr. 37; *Harley v. Harley*, 10 Hare, 325.

(*m*) *Ellison v. Elwin*, 13 Sim. 309; *Ashby v. Ashby*, 1 Coll. 553; *Baldwin v. Baldwin*, 5 De G. & Sm. 319; and see *Hamilton v. Mills*, 29 Beav. 193.

(*n*) See *Bosvil v. Brander*, 1 P. W. 458; *Browne v. Elton*, 3 P. W. 202; *Wallace v. Auldjo*, 2 Dr. & Sm. 216; *Osborn v. Morgan*, 9 Hare, 432.

(*o*) *Atcheson v. Atcheson*, 11 Beav. 485; *Ward v. Ward*, 14 Ch. D. 506; *Re Bryan*, 14 Ch. D. 516. See as to cases since the recent Act, *Re March*, 24 Ch. D. 222, 27 Ch. D. 166.]

¹ *Pointdexter v. Jeffries*, 15 Gratt. 363; *Glen v. Fisher*, 6 Johns. Ch. 33; *Duval v. The Bank*, 4 Gill. & J. 283; *Abernethy v. Abernethy*, 8 Fla. 243; *Guild v. Guild*, 16 Ala. 122; *Davis v. Newton*, 6 Met. 537; *Stevenson v. Brown*, 3 Green Ch. 503; *Tucker v. Andrews*, 13 Me. 124; *Barron v. Barron*, 24 Vt. 375. In North Carolina a wife has no equity to a settlement, *Lassiter v. Dawson*, 2 Dev. Eq. 383; courts of law in Pennsylvania enforce this equity by imposing terms on the husband who seeks to recover his wife's *choses in action*, *Reese v. Waters*, 9 Watts, 90.

equity to a settlement actively.

it is undoubtedly one which the wife has a right, according to the now established practice of the Court, to assert *actively*, either by an action (*p*)¹, or, in the case of an already existing suit, by petition (*q*), at any time before the husband has finally reduced the equitable interest into possession, and possession by the husband in the mere character of *executor*, or *administrator*, or *trustee*, and not as husband in his marital right will not be deemed a reduction into possession to defeat the equity to a settlement (*r*)². [And the equity may be enforced in respect of a fund which is possessory although not actually distributable, as in the case of a share of an estate which is being administered by the Court, but which will not be distributable until further consideration (*s*).] It is equally clear that the equity is one which the wife has a right to waive, by consenting in open Court (*t*) to the receipt of the equitable in-

(*p*) *Lady Elibank v. Montolieu*, 5 Ves. 737; *Duncombe v. Greenacre*, 28 Beav. 472; on appeal, 2 De G. F. & J. 509. [The right is a personal one in the wife, and, on her death without having taken any steps to assert it, fails, and cannot be set up by her children. If however, the wife has taken proceedings to enforce her equity, and has obtained a decree or order referring the matter to the Judge in chambers to approve a proper settlement, the children are entitled to the benefit of that decree or order, and may bring an action to enforce the settlement. But if the wife dies after the institution of the action, but before a decree or order for a settlement has been made, the children, who have no equity except to enforce a judgment obtained in their favour, cannot compel a settlement, *Lloyd v. Williams*, 1 Mad. 450; *De la Garde v. Lempriere*, 6 Beav. 344; *Wallace v. Auldjo*, 2 Dr. & Sm. 216, 234; and even after a decree for a settlement has been made, the wife may, while the settlement is still *in fieri* and unexecuted, come into Court and waive her right, and so disappoint the claims of the children, *Lloyd v. Williams*, *ubi sup.*; *Pember-ton v. Marriott*, 47 L. T. N. S. 332.]

(*q*) *Greedy v. Lavender*, 13 Beav. 62; *Scott v. Spashett*, 3 Mac. & G. 599; [*Re Robinson's Settled Estate*, 12 Ch. D. 188.]

(*r*) *Baker v. Hall*, 12 Ves., 497; *Wall v. Tomlinson*, 16 Ves. 413; [*Re Birchall*, 44 L. T. N. S. 243.]

[(*s*) *Re Robinson's Settled Estate*, 12 Ch. D. 188.]

(*t*) And now as to interests acquired under an instrument made after 31st December, 1857, the wife may, after the fund has be-

¹ *Wiles v. Wiles*, 3 Md. 1; *Pointdexter v. Jeffries*, 15 Gratt. 363. Some cases go so far as to compel a settlement when the suits to recover the property are in a Court of common law, *Van Epps v. Van Deusen*, 4 Paige, 64; *Corley v. Corley*, 22 Ga. 178. It seems the better opinion, however, that where a husband or a creditor or assignee is pursuing a strictly legal right in a Court of law a Court of equity cannot interfere to displace a settlement, *Wheeler v. Bowen*, 20 Pick. 563; *Parsons v. Parsons*, 9 N. H. 309. See *Perry on Trusts* (3rd ed.), § 629.

² *Gochenaur's Est.*, 23 Pa. St. 460; *Ross v. Morton*, 10 Yerg. 190; *Miller's Estate*, 2 Ashm. 223.

terest by the * husband, [but an infant is not [* 742] capable of giving such consent (*u*)¹.] But the wife may revoke her consent at any time before the actual transfer (*v*), and she has no power of consenting *out of Court*, and therefore a trustee who thinks a settlement ought to be executed, which the husband rejects, is justified, notwithstanding the wife's wishes to the contrary, in paying the money into Court (*w*)². Where the husband, an executor, is a defaulter to the estate, the wife, one of the residuary legatees, has no equity to a settlement as against the claims of other persons who suffer by the default (*x*). But if the husband be a debtor to the estate of an intestate the wife's equity will prevail, and the administrator cannot stop the debt as against the wife (*y*).

4. In one case where the fund was under 200*l.*, and therefore by the practice of the Court payable to the husband without the consent of the wife, the wife, though the husband had deserted her, had no equity to a settlement (*z*). But this case has since been overruled, and the Court has directed the whole fund, though it was under 200*l.*, to be settled upon the wife and children (*a*).

As to fund under 200*l.*

5. The wife's equity to a settlement subsists not only against the husband himself, but also, *as a general rule*, against those claiming under him, as a trustee under his bankruptcy,³ or an assignee by deed, even for valuable consideration; in fact the assertion of the equity most commonly takes place in cases where the husband has become bankrupt or has assigned the fund. Where

Equity to settlement prevails against assignees in law or by deed.

come possessory, release her equity to a settlement by deed acknowledged, 20 & 21 Vict. c. 57, s. 1.

[(*u*) *Shipway v. Ball*, 16 Ch. D. 376.]

(*v*) *Penfold v. Mould*, 4 L. R. Eq. 562.

(*w*) *Re Swan*, 2 H. & M. 34. But see *contra*, *Re Roberts' Trusts*, 38 L. J. N. S. Ch. 708, [where the trustees were saddled with costs for paying the money into Court.]

(*x*) *Knight v. Knight*, 18 L. R. Eq. 487.

(*y*) *In re Cordwell's Estate*, 20 L. R. Eq. 644.

(*z*) *Foden v. Finney*, 4 Russ. 428.

(*a*) *Re Cutler*, 14 Beav. 220; [*Re Kincaid's Trusts*, 1 Drew. 326;] *Re Merriman's Trust*, 10 W. R. 334.

¹ *Wiles v. Wiles*, 2 Md. 1; *Pointdexter v. Jeffries*, 15 Gratt. 363; *Durr v. Boyer*, 2 McCord. Ch. 368. An infant cannot consent, *Phillips v. Hessel*, 10 Humph. 197; *Ex parte Warfield*, 11 Gill. & J. 23.

² But if a wife stand by and assent to a sale by her husband she is estopped from claiming a settlement, *Wright v. Arnold*, 14 B. Mon. 638; *Smith v. Atwood*, 14 Ga. 402.

³ *Pages v. Estes*, 19 Pick. 269; *Thomas v. Kennedy*, 1 Paige, 620; *Athney v. Knotts*, 6 B. Mon. 24.

owing either to the trustee refusing to pay without suit, or to the wife's taking independent proceedings of her own, the fund comes under the control of the Court, the latter commonly considers that payment of *one-half* to the husband or the assignees, and the settlement of the other half on the *wife and children*, is, in the absence of special circumstances, a reasonable apportionment (b). As the moiety paid to the husband or assignees represents the whole of the husband's interest, the entirety of the other moiety must be settled on the [* 743] wife and children, to the exclusion of the * husband (c), except on failure of issue (d), in which event the husband will take, whether he survive the wife or not (e). It would appear that in Lord Eldon's time a rule existed against giving the wife the *whole* fund (f). But subsequently, in a case (g) in the Exchequer, where the husband was *insolvent*, Baron Alderson directed a settlement of the *whole* fund, considering *insolvency* to afford ground for a special exception. At the present day it is clear that the Court, wherever the special circumstances warrant the step (as, for instance, where the husband has abandoned the wife, or is not in a position to maintain her, and the fund is not more than sufficient for her maintenance) will settle the whole corpus, and, it seems, the arrears of income (h) on the wife and children (i). In every case the Court exercises a dis-

(b) *Spirett v. Willows*, 1 L. R. Ch. App. 520; *Napier v. Napier*, 1 Dru. & War. 407; *Vaughan v. Buck*, 1 Sim. N. S. 287; *Bagshaw v. Winter*, 5 De G. & Sm. 468; *Marshall v. Gibbings*, 4 Ir. Ch. Rep. 276; *Re Grove's Trusts*, 3 Giff. 582. In *Re Suggitt's Trusts* 3 L. R. Ch. App. 215, the L. J. J. gave the husband a third only.

(c) *Lloyd v. Williams*, 1 Mad. 450; *Barker v. Lea*, 6 Mad. 330; *Whittem v. Sawyer*, 1 Beav. 593.

(d) *Carter v. Taggart*, 5 De G. & Sm. 49; *Spirett v. Willows*, 12 Jur. N. S. 538; *Gent v. Harris*, 10 Hare, 383; *Bagshaw v. Winter*, 5 De G. & Sm. 468.

(e) *Croxton v. May*, 9 L. R. Eq. 404; *Walsh v. Wason*, 8 L. R. Ch. App. 482; but see *Re Suggitt's Trusts*, 3 L. R. Ch. App. 215. For the details of the proper settlement, see *Spirett v. Willows*, 4 L. R. Ch. App. 407; [*Cogan v. Duffield*, 2 Ch. D. 44; *Re Gowan*, 17 Ch. D. 778; and as to giving the wife a power of appointment among the children, see *Oliver v. Oliver*, 10 Ch. D. 765; which case, however, was disapproved of in *Re Gowan*.]

(f) *Dunkley v. Dunkley*, 2 De G. M. & G. 396.

(g) *Brett v. Greenwell*, 3 Y. & C. 230. [But Sir E. Sugden when Lord Chancellor of Ireland declined to follow this case. See *Napier v. Napier*, 1 Dru. & War. 407.]

(h) *Wilkinson v. Charlesworth*, 10 Beav. 324; but see *Newman v. Wilson*, 31 Beav. 34.

(i) *Smith v. Smith*, 3 Giff. 121; *Bowyer v. Woodman*, 3 L. R. Eq. 313; *Duncombe v. Greenacre* (No. 2), 29 Beav. 378; *Re Grove's Trust*, 3 Giff. 582; *Bray v. Laycock*, 2 Eq. Rep. 385; *Gardner v.*

cretion as to the amount with reference to the particular circumstances (*k*)—namely, the conduct of the parties (*l*), the wife's means of livelihood (*m*); the settlement, if any, previously made upon her (*n*), and the sums before received by the husband in respect of the wife's fortune (*o*). Where the wife has been amply provided for,* and the husband has not misconducted himself, the Court has dismissed the wife's bill with costs, and left the husband at liberty to follow up his marital rights (*p*)¹.

[6. Where a married woman, upon being examined, expressed a wish that part of the fund to which she was entitled should be retained in Court, and the income paid to her, with liberty for her to apply for payment of the capital at a future period, if she desired it, the Court made the order, settling the fund upon her for life, with remainder to her children, with liberty for her to apply to the Judge at chambers for a transfer of all or any of the capital to her, by way of revocation of the settlement (*q*).]

[Part of the fund retained in Court with liberty to apply.]

7. Upon principle it would seem that the wife's equity to a settlement ought *in all cases* to be the same,

How far life interest of wife is subject to equity to a settlement.

Marshall, 14 Sim. 575; Koeber v. Sturgis, 22 Beav. 589; *Re Kincaid*, 1 Drew. 326; *Watson v. Marshall*, 17 Beav. 363; *Ward v. Yates*, 1 Dr. & Sm. 80; *Dunkley v. Dunkley*, 2 De G. M. & G. 390; *Carter v. Taggart*, 5 De G. & Sm. 49; *Duncombe v. Greenacre*, 28 Beav. 472; *Gent. v. Harris*, 10 Hare, 383; *Re Welchman*, 1 Giff. 31; *Re Tutin's Trust*, W. N. 1869, p. 141; *Nicholson v. Carline*, 22 W. R. 819; *Re Cordwell's Estate*, 20 L. R. Eq. 644; and see [Taunton v. Morris, 8 Ch. D. 453; 11 Ch. D. 779;] *Bonner v. Bonner*, 17 Beav. 86. In one case where the wife had been abandoned by her husband for upwards of 20 years, the Court ordered the corpus of the fund to be paid to the wife as a *feme sole*; *Re Pope's Trust*, W. N. 1873, p. 79.

(*k*) *Re Suggitt's Trust*, 3 L. R. R. Ch. App. 215.

(*l*) *Gilchrist v. Cator*, 1 De G. & Sm. 188; *Barrow v. Barrow*, 5 De G. M. & G. 782; [*Boxall v. Boxall*, 27 Ch. D. 220.]

(*m*) *Bagshaw v. Winter*, 5 De G. & Sm. 467; *Ex parte Pugh*, 1 Drew. 202.

(*n*) *Scott v. Spashett*, 3 Mac. & G. 599; *Spicer v. Spicer*, 24 Beav. 365; *Spirett v. Willows*, 12 Jur. N. S. 538.

(*o*) *Gardner v. Marshall*, 14 Sim. 575; *Vaughan v. Buck*, 1 Sim. N. S. 287.

(*p*) *Giacometti v. Prodgers*, 14 L. R. Eq. 253; 8 L. R. Ch. App. 338.

[(*q*) *Re Craddock's Trust*, W. N. 1875, p. 187; see *Boxall v. Boxall*, 27 Ch. D. 220, 225.]

¹ If a husband abandon his wife or maltreat her the Court may interfere and settle upon her for her support all her choses in action not to possession by her husband, although no suit be pending concerning them, and although the fund is not in Court or even within the jurisdiction. *Rees v. Waters*, 9 Watts. 90; *Martin*, 1 Hoff. 462; *Haviland v. Meyers*, 6 Johns. Ch. 25, 178.

whether it be claimed against the husband or his trustee in bankruptcy or his assignee for value. There is, however, an exception where the subject matter against which the equity is asserted is a *life interest* of the wife. In this case, so long as the husband maintains the wife, he is entitled to receive the income of her life estate, and there can be no equity to a settlement (*r*). If, however, he deserts her, or is divorced by reason of his misconduct, the Court will not allow him to receive the income without securing at least a portion of it for the maintenance of the wife (*s*); and *pari ratione* where the husband becomes bankrupt and the wife is left without the means of subsistence, the same equity will be enforced against the trustee in bankruptcy (*t*). But where the husband assigns the income for value while duly discharging the marital obligation of maintenance, and *subsequently* deserts his wife, the wife is held to have no equity against the particular assignee for value, for the very object of the husband in making the alienation may have been to find the means for better providing for his wife, and the purchaser cannot be involved in such an enquiry (*u*).

Right by survivorship.

8. It must be remembered that the wife's *equity to a* [* 745] *settlement* * and her *right by survivorship* are two entirely distinct things. The former does not apply where the fund is *reversionary* (*v*),¹ but arises only when the fund is ready for *reduction into possession*, and may be waived by the wife as before stated; the latter the wife cannot, by any act during coverture, deprive herself of, except so far as the provisions of the

(*r*) *Bullock v. Menzies*, 4 Ves. 798; *Re Duffy's Trust*, 28 Beav. 386, and cases there cited. [But see the observations in *Taunton v. Morris*, 8 Ch. D. 453; 11 Ch. D. 779.]

(*s*) *Barrow v. Barrow*, 5 De G. M. & G. 782; *Tidd v. Lister*, 3 De G. M. & G. 870.

(*t*) *Vaughan v. Buck*, 1 Sim. N. S. 384; *Squires v. Ashford*, 23 Beav. 132; *Barnes v. Robinson*, 1 N. R. 257. [See *Taunton v. Morris*, 8 Ch. D. 453, affirmed 11 Ch. D. 779, where the Court in the case of an insolvent debtor who contributed nothing to the support of his wife, gave the *whole income* to the wife to the exclusion of the provisional assignee.]

(*u*) *Tidd v. Lister*, 10 Hare, 140; 3 De G. M. & G. 857; *Re Duffy's Trust*, 28 Beav. 386; [and see *Taunton v. Morris*, 11 Ch. D. 779.]

(*v*) *Osborn v. Morgan*, 9 Hare, 432.

¹ Or when in remainder; *Sale v. Saunders*, 24 Miss. 24; *Moore v. Thornton*, 7 Gratt. 99; *Reese v. Holmes*, 5 Rich. Eq. 531. In Pennsylvania, Kentucky and North Carolina the English rule is discarded on this point, *Knight v. Leak*, 2 Dev. & Bat. 133; *Jackson v. Sublett*, 10 B. Mon. 469; *Webb's Appeal*, 21 Pa. St. 248.

recent Act (*w*) may enable her so to do. Occasionally resort has been had to certain ingenious devices for the purpose of bringing the wife's reversionary interest into possession. Thus where a fund has been settled on A. for life, and after his decease on B. a married woman absolutely, the husband of B., in order to reduce the wife's *chose en action* into possession, has purchased the prior life interest, and had it assigned to himself or his wife. But this scheme will not bear examination, for if the assignment be made to the husband, then, as the life interest was possessed by him in his *own right*, and the reversionary interest in *right of his wife*, the two will not coalesce; and if the assignment was made to the wife so that the husband would have both interests in the same right, then the *feme* on the coverture ceasing might disclaim the accession of interest and so prevent the intended merger. The late Vice Chancellor of England held in several cases that the *chose en action* could thus be reduced into possession (*x*), and on one occasion Lord Cottenham, on an application to take the wife's consent, seems to have assented to the doctrine (*y*). But in a case before Lord Langdale, M. R., the question was considered to involve too much difficulty to be disposed of on petition (*z*); and the case of *Whittle v. Henning* (*a*) before Lord Cottenham, and other cases (*b*), have since decided that a reversionary *chose en action* of the wife cannot by means of this machinery be reduced into possession so as to be made disposable. However, if a fund be settled on A. for life, and the remainder be appointed to the *feme covert* for her *separate use*, and her power of anticipation is not restrained, the tenant for life and *feme covert* in remainder can deal with the fund (*c*).

[9. If the husband assign the reversionary interest of his wife in a *chose en action*, and survive her, and the interest be not reduced * into possession [* 746]

[Administration by surviving husband to wife's estate.]

(*w*) 20 & 21 Vict. c. 57; see p. 23, *supra*.

(*x*) *Creed v. Perry*, 14 Sim. 592; *Bean v. Sykes*, Ib. 593; *Lachton v. Adams*, Ib. 594; *Hall v. Hugonin*, Ib. 595; *Bishop v. Colebrook*, 16 Sim. 39; *Wilson v. Oldham*, 5th March, 1841, MS.; see the opinion of the late Mr. Jacob in 3rd edit. p. 371.

(*y*) *Lachton v. Adams*, 14 Sim. 594.

(*z*) *Story v. Tonge*, 7 Beav. 91; and see *Box v. Box*, 2 Conn. & Laws. 605.

(*a*) 2 Ph. 731.

(*b*) *Box v. Jackson*, 6 Ir. Eq. Rep. 174; *Williams v. Mayne*, 1 I. R. Eq. 519; [*Re Butler's Trusts*, 3 I. R. Eq. 138; 3 L. R. Ir. 89.]

(*c*) See *Dudley v. Tanner*, W. N. 1873, p. 75.

during her life, administration to the wife's estate must be taken out before the assignee of the husband can compel payment of the interest assigned (*d*).]

Equitable
chattels real
of feme
covert.

10. As regards the wife's equitable *chattels real*, the effect of marriage being, as a general rule, the same upon equitable as upon legal interests, it follows, that as the husband may assign the *chattels real* of the wife at *law*, so he may assign her *trust* of a term in equity (*e*), though it be [reversionary (*f*) or] merely a contingent interest (*g*); and without the concurrence of either the wife or the trustee, and without consideration. And this doctrine is not interfered with by the case of *Purdew v. Jackson* (*h*); for a trust of chattels real is not a *chose en action*, but a present interest—an estate in possession (*i*). If, however, the equitable interest in the chattel be such that it could not by possibility vest in the wife during the coverture, then, inasmuch as the legal interest of a similar kind could not be disposed of by the husband, he cannot dispose of the equitable interest (*k*). If a husband mortgage his wife's chattel real, and the wife survives, she has the equity of redemption, though the mortgage deed recited falsely that the husband was absolutely entitled (*l*). If the equitable interest in the chattel be settled to the *separate use* of the *feme covert*, and she does not dispose of it, it survives to the husband (*m*).

Whether
wife entitled
to settlement
out of
equitable
chattels real.

11. Whether the doctrine regarding the wife's *equity* to a *settlement* extends to the *equitable chattels real* of the wife, has been much doubted. It was held in one case, by Vice-Chancellor Wigram, as a result of the principles laid down by Lord Cottenham, in *Sturgis v.*

[(*d*) *Re Butler's Trusts*, 3 L. R. Ir. 89.]

(*e*) *Roupe v. Atkinson*, Bunb. 162; *Mitford v. Mitford*, 9 Ves. 99, *per* Sir W. Grant; *Re Carr's Trusts*, 12 L. R. Eq. 609; *Packer v. Wyndham*, Pr. Ch. 418, 419, *per* Lord Cowper; *Franco v. Franco*, 4 Ves. *528, *per* Lord Alvanley; *Bullock v. Knight*, 1 Ch. Ca. 266, *per* Lord Nottingham; *Sanders v. Page*, 3 Ch. Rep. 223, *per Cur.*; *Macauley v. Philips*, 4 Ves. 19, *per* Lord Alvanley; *Wikes' Case*, Lane, 54, *per* Barons Snig and Altham; S. C. Roll. Ab. 343; *Jewson v. Moulson*, 2 Atk. 421, *per* Lord Hardwicke; *Incedon v. Northcote*, 3 Atk. 435, *per eundem*; *Clark v. Burgh*, 2 Coll. 221; [*Re Bellamy*, 25 Ch. D. 620.]

[(*f*) *Re Bellamy*, 25 Ch. D. 620.]

(*g*) *Donne v. Hart*, 2 R. & M. 360.

(*h*) 1 Russ. 1.

(*i*) See *Mitford v. Mitford*, 9 Ves. 98, 99; *Holland's case*, Style, 21; *Burgess v. Wheate*, 1 Eden, 223, 224; *Box v. Jackson*, 1 Drury, 84.

(*k*) *Duberly v. Day*, 16 Beav. 33.

(*l*) *M'Cullagh v. Littledale*, 9 I. R. Eq. 465.

(*m*) *Archer v. Lavender*, 9 I. R. Eq. 220.

Champneys (n), that even where the husband could dispose of the equitable chattel, the wife was entitled to a provision out of the equitable interest, as against the assignee of the husband for valuable consideration (o). The opinion of the Vice Chancellor * himself [* 747] was the other way, but he considered himself bound by the authority of the Chancellor in the case referred to.

12. The result of these decisions is remarkable. Thus, a mortgage by the husband of the wife's *legal* term bars her of all right, except in the equity of redemption (p); while under a similar mortgage of the *equitable* term, she would have an equity to a settlement as against the mortgagee. Again, the *legal* reversionary term of the wife, provided it be such as may by possibility vest during the coverture, is capable of absolute assignment by the husband; and the wife has no right by survivorship, such as exists in the case of her *chose en action*, while as respects the assignment of a similar *equitable* interest there would be an equity to a settlement in the wife. The difficulties of applying the doctrine of the *wife's equity* to the case of chattels real, must, undoubtedly prove considerable; but it can be hardly expected that the steps, of which Lord Cottenham in *Sturgis v. Champneys* took the first, will now be retraced.

13. It is conceived that if the husband, or the assignee from him of the wife's *equitable term*, can procure an assignment of the *legal estate* from the trustee, the wife's equity to a settlement is at an end; but the point is not touched by authority.

Effect of getting in legal estate of wife's equitable term.

14. The equitable interest of the wife in a *chattel real* is not a *chose en action*, but an estate, and therefore, although, according to the principles laid down in *Sturgis v. Champneys*, the wife can claim an equity to a settlement out of such estate *prospectively*, yet until such claim is established, the right of the husband prevails. All arrears of income therefore which may have occurred before the claim, whether from an equitable estate in fee or for life, or a term of years, will be exempt from the equity to a settlement, and belong to the husband or his assignee (q).

Arrears of income.

15. If a judgment be acknowledged to A. in trust for

(n) 5 M. & Cr. 77; and see *Wortham v. Pemberton*, 1 De G. & Sm. 644.

(o) *Hanson v. Keating*, 4 Hare, 1.

(p) *Hill v. Edmonds*, 5 De G. & Sm. 603; *Clark v. Cook*, 3 De G. & Sm. 333.

(q) *Re Carr's Trust*, 12 L. R. Eq. 609.

Estate by
elegit in
trust for a
feme covert.

a *feme sole*, and she marries, and the conusee of the judgment sues out an *elegit*, and possession of the lands is delivered to him in trust for the wife, the husband may assign the *extended interest*, as he might have assigned the trust of a term certain (*r*); and the law is the same where the *feme* is put in possession of lands by a decree of a Court of equity until a certain sum is raised by way of *equitable elegit* (*s*). But a *mere judgment*, recovered by the wife before the [* 748] *coverture, is clearly a *chose en action*, and as such cannot be disposed of by the husband as against the wife surviving (*t*).

Mortgage
term in
trust for a
feme covert.

16. And it has been held that a *mortgage term* in trust for the wife (*u*), or a *term in trustees for raising a portion* for her (*v*), may be assigned by the husband, so as to carry the beneficial interest. But in these cases a doubt arises whether the debt or portion may not be held to be the principal thing; and as the doctrine that a *chose en action* of the wife is not disposable by the husband is of far more recent date than the decisions referred to, the question cannot be considered as settled. The cases in which it has been held under the order and disposition clause in bankruptcy, that the land draws with it the debt, so as to exclude the operation of the clause, tend to support the old authorities (*w*), but they are hardly conclusive, and a modern decision of Sir John Romilly, M.R., which was affirmed on appeal, has shaken the authority of the older cases (*x*).

Wife's
equitable
interest in
lands of
freehold or
inheritance.

17. The case of the wife's equitable estate in lands of *freehold* or *inheritance*, presents in the main the same general similarity to the case of her *legal* estate in like lands, as has been noticed in respect of chattels real. Thus the husband without the wife can, in the case of the equitable as in that of the legal interest convey an estate for the *joint lives* of himself and his wife (*y*), or for his *own life after issue born*. So he and his wife conjointly can, by deed acknowledged by

(*r*) Lord Carteret v. Paschal, 3 P. W. 201, *per* Lord King. But this was before the case of Purdew v. Jackson, 1 Russ. 1.

(*s*) S. C. Ib. 179.

(*t*) Fitzgerald v. Fitzgerald, 8 C. B. 611.

(*u*) Bates v. Dandy, 2 Atk. 507; Packer v. Wyndham, Pr. Ch. 412, see 418.

(*v*) Walter v. Saunders, 1 Eq. Ca. Ab. 58; Incledon v. Northcote, 3 Atk. 430, see 435; and see Mitford v. Mitford, 9 Ves. 99; Hore v. Becher, 12 Sim. 465.

(*w*) Jones v. Gibbons, 9 Ves. 407; and see Rees v. Keith, 11 Sim. 388.

(*x*) Duncombe v. Greenacre, 28 Beav. 472, 2 De G. F. & J. 509.

(*y*) As to the legal estate, see Robertson v. Norris, 11 Q. B. 916.

the latter under the Fines and Recoveries Act, dispose of the equitable and of the legal interest; and can bar an equitable entail as they might a legal entail, by deed inrolled in Chancery; [and can dispose of an equitable reversionary interest in freehold property, which has been purchased by trustees in breach of trust and is still personal estate in equity (z).]

18. But according to Lord Cottenham's decision in *Sturgis v. Champneys* (a), the acts of the husband alone cannot affect the wife's equity to a settlement, where the interest of the wife can only be recovered through the medium of a *Court of equity* (b).

* The propriety of the decision in this case [* 749] was questioned by the late Lord Westbury (c). But after so long a lapse of time it is not likely that the principle of it will be shaken. It has accordingly been held that as regards an equitable freehold, that is, an estate to which a *feme covert* is entitled in equity for her own life, she may proceed actively, and institute a suit against the trustee of her bankrupt husband for a settlement of it upon herself (d). But she has no such equity against a purchaser, for value, from her husband, who at the time was supporting her (e). In short, the principles which govern the wife's equitable interest for life in realty, are the same as those which regulate the like interest of the wife in personalty (f).

19. As to the case of an equitable fee simple or fee tail to which a *feme covert* is entitled, a distinction must be borne in mind between the husband's powers over a wife's personal, and over her real estate. The husband can get possession of the absolute interest of the former and make away with it; and therefore the Court settles the corpus or a competent part of it on the wife and her children; but as to realty, the husband has no

Equitable estates in fee simple or fee tail.

[(z) *Re Durrant and Stoner*, 18 Ch. D. 106.]

(a) 5 M. & Cr. 97.

(b) At law a husband during the coverture and before issue born has the estate for the joint lives of himself and his wife, but in her right only; and even after issue born he has no estate in his own right, for curtesy does not commence until the death of the wife, *Jones v. Davies*, 8 Jur. N. S. 592. Until the late Act, 8 & 9 Vict. c. 106, s. 6, a husband could not during the coverture have passed the legal estate for his own life, except by a conveyance which carried the fee tortiously, as by a feoffment; Co. Lit. 30, a.

(c) See *Gleaves v. Paine*, 1 De G. J. & S. 87.

(d) *Barnes v. Robinson*, 1 New Rep. 257; *Sturgis v. Champneys*, 5 M. & Cr. 97.

(e) *Tidd v. Lister*, 10 Hare, 140; 3 De G. M. & G. 857; *Stanton v. Hall*, 2 R. & M. 175.

(f) See *ante*, 744.

power over the corpus, but can dispose only of the interest during the joint lives, or if there be issue, for his own life; and as this limited interest is all that the husband or those claiming under him can deal with, and the husband has the *curtesy* in his *own right*, it is only the interest during the *joint lives* that requires to be settled. As to any ulterior interest, the Court has properly nothing to do with it. If the wife be tenant in fee,—why should the heir be disinherited in favour of the children? and if the wife be tenant in tail,—why should the issue in tail and remainderman be defeated? “In the case of the wife’s real estate, observed V. C. Wood, “she wants no protection out of the *corpus* of that estate, for she cannot be deprived of it without her own concurrence, which the law requires to be given in such a manner as will protect her from her husband” (g). Where, therefore, the wife is tenant in fee or in tail in equity, the claim of the wife stands on [* 750] the same footing as * where she is tenant for life in equity, and has been so dealt with accordingly (h).

[Real estate held upon trust for sale.]

[20. Where real estate is held upon trust for sale and to pay the proceeds to a married woman, the husband can, after the land has actually been sold, give a good discharge for the purchase-money, but until the sale the husband cannot by any act of his bar the wife’s right (i).

[Fund in Court representing realty.]

21. Where a fund in Court represents realty to which a married woman is absolutely entitled, she may elect to take it as personalty, and upon her being separately examined and consenting, it may be paid out to her husband without any deed being executed (k).

[Alimony.]

22. A married woman, to whom permanent alimony

(g) *Durham v. Crackles*, 8 Jur. N. S. 1175.

(h) *Wortham v. Pemberton*, 1 De G. & Sm. 644; *Durham v. Crackles*, 8 Jur. N. S. 1174. L. J. Knight Bruce on one occasion observed, “We do not touch the husband’s possible tenancy by the curtesy in the real estate of which we direct a settlement, and, so far as I am concerned, for this reason, that in my opinion we have not jurisdiction to order any settlement which shall interfere with it;” *Smith v. Matthews*, 3 De G. F. & J. 153. From which it might be inferred that a settlement subject to the curtesy might extend beyond the joint lives; but if the Court under special circumstances, has ever directed a settlement of the equitable fee on the wife and children, the settlement as regards the children must be viewed as the voluntary settlement of the wife, and not the judicial act of the Court. See *Gleaves v. Paine*, 1 De G. J. & S. 87; *Smith v. Matthews*, 3 De G. F. & J. 139.

[(i) *Franks v. Bollans*, 3 L. R. Ch. App. 717.]

[(k) *Standerer v. Hall*, 11 Ch. D. 652; *Re Robins’ Estate*, 27 W. R. 705.]

has been allowed on a judicial separation from her husband, cannot alienate it, as it is not in the nature of property but is simply an allowance to provide for the daily maintenance of the wife and is by its very nature inalienable (l).]

23. The mere circumstance of the existence of a *jointure-term*, preceding the estate of a *feme covert* Existence of an outstanding term. tenant in tail in possession subject to the term, sufficiently renders the wife's estate equitable to entitle her to a settlement during the joint lives in a suit instituted by her (m). And, indeed, wherever, a plaintiff is obliged to come into a *Court of equity* he must submit to do *equity*, though the estate of the wife is *legal*, as if a husband make an equitable mortgage of land of which his wife is seised at law, the mortgagee cannot obtain a legal mortgage or enforce his security without providing for the wife, if deserted or not maintained at the time of the equitable mortgage (n).

24. The effect of the husband, or the *husband's assignee*, procuring a conveyance of the *legal estate* so as to clothe his equitable * interest therewith, [* 751] Getting in the legal estate. must be the same as in the case of an equitable term of years before adverted to (o).

[(B.) Of the modifications introduced by the Married Women's Property Act, 1882 (p).] [Married Women's Property Act, 1882.]

1. The 2nd sect. of the Act enables every woman married *after* the commencement of the Act (1st January, 1883) to hold as her separate property and to dispose of by will, or otherwise, all real and personal property which belongs to her at the time of marriage, or is acquired by or devolves upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill.

And the 5th sect. enables every woman married *before* the commencement of the Act to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, accrues after the commencement of the Act,

[(l) *Re Robinson*, 27 Ch. D. 160.]

(m) *Wortham v. Pemberton*, 1 De G. & Sm. 644.

(n) *Durham v. Crackles*, 8 Jur. N. S. 1174.

(o) See *ante*, p. 747.

[(p) 45 & 47 Vict. c. 75].

including any wages, earnings, money and property, so gained or acquired by her as aforesaid (q)¹.

2. The result of this enactment is that as to women married since the 31st December, 1882, and also as to property accruing after that date to women married before that date, the rights of the husband, at any rate during the life of the wife, are entirely excluded, and the wife is enabled to deal with, bind and dispose of her property, whether real or personal, in the same manner as if she were a *feme sole*. The cases relating to the rights of the husband in the wife's property, and to the equity to a settlement of the wife, and to the wife's right by survivorship have, therefore, no bearing, where the marriage has taken place or the property has been acquired since the 31st December, 1882.

[Property falling into possession after the commencement of the Act.]

3. It will be observed that the 5th sect. relates to the *accruer* of the married woman's *title*, which must take place after the commencement of the Act to bring the case within the section, and the section seems not to deal with the case of a change in the title such as occurs when a contingent interest becomes vested or a reversionary interest falls into possession. The contrary view was however taken by Chitty, J., in a case where the question was whether the separate examination of the married woman could be dispensed with (r). [* 752] * The case appears to have been unopposed and can hardly be regarded as a final decision on the point and although it has since been followed (s), the judges in following it have withheld any expression of their own opinions upon the point, and it is submitted that the true construction of the section is to confine it to the case where the original title has accrued since the commencement of the Act. The Act ought not be construed so as to deprive husbands married before the

[(q) As to the protection extended to the trade or business from which the earnings arise, see *Ashworth v. Outram*, 5 Ch. D. 923, *post* 788, note (c).]

[(r) *Baynton v. Collins*, 27 Ch. D. 604.]

[(s) *Re Thompson and Curzon*, W. N. 1885, p. 60; *Re Hughes' Trusts*, W. N. 1885, p. 62.] *Re Thompson and Curzon* is now reported in 29 Ch. D. 177. But see the subsequent cases of *Re Tucker*, W. N. 1885, p. 148, and *Re Adams' Trusts*, 33 W. R. 834, where Pearson, J., and Kay, J., declined after argument to follow the former cases.

¹ In very many of the United States similar statutory provisions exist, generally coupled, however, with a clause requiring the husband to join in or in writing assent to his wife's conveyance of her real estate. See *Perry on Trusts*, § 675 (3rd ed.).

Act of an interest which had already accrued to them when the Act was passed.¹

4. Whether the rights of the husband after the wife's death in such parts of her property as have not been disposed of by her are affected by the Act, is a question upon which there has been some difference of opinion founded on the use of the words "*feme sole*" in the 1st sect., but it will be observed that that section only gives to a married woman certain *specific* rights, or subjects her to certain *specific* liabilities. "as if she were a *feme sole*," such as to "acquire, hold and dispose of property," "to contract," "to sue and be sued," or "to be made a bankrupt," and by implication excludes the construction that she is for all purposes to be treated as a *feme sole*. It is conceived, therefore, that the true construction of the Act is that the rights in a married woman's property after her death, so far as such property is not disposed of or bound by her in her life-time, are unaffected by the Act, and that the husband will be entitled, as to personal chattels and cash by the marital right, and as to *choses en action* on taking out administration to her estate under 29 Car. II, c. 3, s. 24, to retain her undisposed of personal estate to the exclusion of her next of kin (*t*). It is true that the 23rd sect. provides that "for the purposes of the Act the legal personal representative of any married woman is in respect of her separate estate to have the same rights and liabilities" as she would have if living (*u*), but these rights cannot include a right of

[Rights of husband in property not disposed of by wife.]

[*t*] The contrary opinion is intimated in Wolstenholme & Turner's Conveyancing Acts, 3rd ed. p. 8 and the case of *In the Goods of Worman*, 1 Sw. & Tr. 513, is cited in support of it, but that was the case of an application for administration to the estate of a married woman who had obtained a protection order under 20 & 21 Vict. c. 85, s. 21, by reason of the husband's desertion, and the grant of administration was expressly limited to "such property as the deceased acquired since her husband's desertion," and inasmuch as, by the joint operation of the 21st and 25th sections of the Act, the property to which administration was granted went on her decease intestate "as the same would have gone if her husband *had then been dead*," the case is no authority in construing the Married Women's Property Act, 1882, which contains no similar words.]

[*u*] The section is ungrammatical but this is apparently what is intended. The words "have or be subject to" seem to have been omitted from the last line.]

¹ Similar Statutes in the United States have been construed as having no effect on the rights of husbands over their wife's estate vested before the enactment of the law. *Burson's App.* 22, Pa. St. 164. *Roby v. Boswell*, 23 Ga. 51; *Tyson v. Mattair*, 8 Fla. 107; *Jenney v. Gray*, 5 Ohio, St. 45; *Snyder v. Snyder*, 3 Barb. 621.

[* 753] disposition * so as to affect the beneficial interest, and refer only, as is conceived, to rights for the protection or benefit of the separate estate.

[Extent of Act.]

The Act has no application where the marriage took place and the property was acquired before the commencement of the Act, 1st January, 1883, and in such cases the old law applies (*v*).

Where a testator dies after the Act, but his will was executed before the passing of the Act, the will must be construed according to the law in force when it was executed, but the interest of a married woman under the will will be governed by the Act. Thus where a residuary estate was given by such a will to A. and B. and C., his wife, under which gift before the Act A. would have taken one moiety, and B. and C. the other moiety as if they had been one person, it was held by the Court of appeal, reversing Chitty, J., that A. was still entitled to one moiety, but the other moiety belonged to B. and C. as joint tenants as if she were unmarried. But the Court of Appeal expressed no opinion as to what share A. would have taken if the will had been executed after the passing of the Act (*w*).

[Whether will of married woman passes property acquired after the death of her husband.]

A question arises whether under the Act a married woman can during her coverture dispose by will of property which she may acquire after the death of her husband and it has been held by Pearson, J., that she has no power to do so (*x*). This seems a somewhat narrow construction of the Act as the 2nd and 5th sects. in terms apply to all real and personal property acquired by a married woman *after her marriage*, where married after the Act, or *after the commencement of the Act* where previously married, and authorize her to dispose of such property by will as her separate property (*y*).

If it was intended that the power should be confined to property acquired "during the coverture" these words should have been used in the 2nd sect. instead of "after her marriage," and in the 5th sect. instead of "after the commencement of the Act."]

[*(v)* *Re Harris' Settled Estates*, 28 Ch. D. 171.]

[*(w)* *Re March*, 27 Ch. D. 166, reversing S. C. 24 Ch. D. 222.]

[*(x)* *Re Price*, W. N. 1885, p. 32; *Re Price* is now reported in 28 Ch. D. 709.]

[*(y)* It is observable that in the 2nd sect. the words are "to have and to hold as her separate property and to dispose of in manner aforesaid" (*i. e.* by will or otherwise), while in the 5th sect. they are "to have and to hold and to dispose of in manner aforesaid as her separate property," but no distinction can be founded upon this.]

Secondly.—Of the separate use.

1. [Independantly of the recent enactments affecting the property of married women] the principle at *common law* is that, as the husband undertakes the debts and liabilities of the wife, he is entitled * absolutely [* 754] or partially, according to the circumstances of the case, to the enjoyment of her property; but in *equity* a *feme* is allowed to contract with the husband before marriage, for the exclusive enjoyment of any specific property (z); or a person may make a gift to the wife during the coverture, and shut out the husband's interference by clearly expressing such an intention. Where the separate estate is the result of a special agreement between the parties, the policy of the law can scarcely be said to be transgressed, for the old rule was established for the benefit and protection of the husband, and *quisque renuntiare potest juri pro se instituto*; but that equity should have allowed a stranger to vest property in the wife independently of the husband during the coverture, appears a more questionable doctrine, though it may be said, that even in that case, there was no violation of the marital rights, for the property never vested in the *feme* herself, and the donor might limit any estate which the law did not refuse to recognise. The Court has also permitted the further anomaly of a restriction upon the *feme's anticipation* (where such an intention has been expressed) of the growing proceeds of the separate estate; but this indulgence appears not a distinct inroad upon the common law incidents of property, but rather an appendage to the separate use for the purpose of more effectually excluding the influence of the husband. If the wife were not debarred from anticipating the proceeds, she might, where the husband was not actuated by proper motives, be induced to divest herself of the property, and place it at the husband's disposal.

Trusts for separate use of a *feme* covert.

2. At the first introduction of the settlement to the separate use it was doubted, whether, to accomplish the object, the interposition of an *express trustee* was not necessary (a), but it was afterwards determined that this precaution might be dispensed with, for, rather than the intention should be disappointed, the husband himself should be construed a trustee for the wife (b)¹.

Not necessary that there should be an express trustee.

(z) See *Parkes v. White*, 11 Ves. 228.

(a) *Harvey v. Harvey*, 1 P. W. 125; *Burton v. Pierpont*, 2 P. W. 78.

(b) *Bennet v. Davis*, 2 P. W. 316; *Parker v. Brooke*, 9 Ves.

¹ *Herr's App.* 5 Watts. & S. 494; *Heck v. Clippinger*, 5 Barr. 385; *Trenton Banking Co. v. Woodruff*, 1 Green, 118; *Freeman v.*

But [as to cases not falling within the recent statute] whether a trustee be expressly appointed or not, the intention of excluding the husband must not be left to inference, but must be clearly and unequivocally declared; for, as the husband is bound to maintain the wife, he has *prima facie* a right to her property, (c)¹; [* 755] but, provided the meaning be clear, * the Court will execute the intention, though the settlor may not have expressed himself in technical language (d)².

[The husband may himself during the coverture give any specific property to the wife for her separate use, without the intervention of a trustee (e);³ and if a husband permit his wife to carry on a business for her own benefit, independently of him, it becomes her separate property, and the husband becomes so far as is necessary a trustee of everything employed in the business for the wife (f).]

In the absence of proof of an unequivocal or final intention on the part of a husband to constitute himself a trustee for his wife, the Court will not after his death, upon her uncorroborated statement, treat the property as belonging to her for her separate use (g).

583; Rolfe v. Budder, Bunb. 187; Prichard v. Ames, T. & R. 222; Newlands v. Paynter, 10 Sim. 377; 4 M. & Cr. 408; Turnley v. Kelly, Wallis's Rep. by Lyne, 311; Archer v. Rooke, 7 Ir. Eq. Rep. 478.

(c) *Ex parte* Ray, Mad. 207, *per* Sir T. Plumer; Wills v. Sayers, 4 Mad. 409, *per eundem*; Massey v. Parker, 2 M. & K. 181, *per* Sir C. Pepys; Kensington v. Dollond, 2 M. & K. 188, *per* Sir J. Leach; Moore v. Morris, 4 Drew. 37, *per* V. C. Kindersley; Fitzgibbon v. Pike, 6 L. R. Ir. 487.]

(d) Darley v. Darley, 3 Atk. 399, *per* Lord Hardwicke; Stanton v. Hall, 2 R. & M. 180, *per* Lord Brougham; [and see *Re* Peacock's Trusts, 10 Ch. D. 490.]

[(e) Lady Cowper's case, cited in *Graham v. Londonderry*, 3 Atk. 393; *Lucas v. Lucas*, 1 Atk. 270; *Walter v. Hodge*, 2 Sw. 92; *Ex parte* Whitehead, 14 Q. B. D. 419.

[(f) *Ashworth v. Outram*, 5 Ch. D. 923; *Ex parte* Whitehead, 14 Q. B. D. 419; and see *Slanning v. Style*, 3 P. W. 334; *Cal-mady v. Calmady*, cited in *Slanning v. Style*, *Ib.* 338.]

[(g) *Re* Whittaker, 21 Ch. D. 657.]

Freeman, 9 Mo. 772; *Long v. White*, 5 J. J. Marsh. 226; *Barron v. Barron*, 24 Vt. 375.

¹ *Carroll v. Lee*, 3 Gill & J. 505; *Pusidell v. Watson*, 2 Dev. Eq. 430; *Fears v. Brooks*, 12 Ga. 197; *Mitchell v. Gates*, 23 Ala. 428.

² *Beal v. Morgner*, 46 Mo. 48; *Fears v. Brooks*, 12 Ga. 195; *Somers v. Craig*, 9 Humph. 467; *Nixon v. Rose*, 12 Grat. 485; *Perry v. Boileau*, 10 Lerg. & R. 208; *Stuart v. Kissam*, 2 Barb. 294.

³ *McKennan v. Phillips*, 6 Wharton 571; *Long v. White*, 5 I. I. Marsh. 223; *Freeman v. Freeman*, 9 Mo. 772; *Hamilton v. Bishop*, 8 Yerger 33.

An allowance made under an order in lunacy to the wife of a lunatic living apart from her husband for her separate maintenance belongs to her for her separate use (*h*).

3. Now by the Married Women's Property Act, 1882, [Married Women's Property Act, 1882.] a married woman can acquire, hold, and dispose of property as her separate estate without the intervention of any trustee (*i*); and under the 2nd and 5th sections of the Act all property acquired by any married woman since the 31st December, 1882, irrespective of the date of her marriage, and also all property belonging to any woman married since that date are made her separate estate.

It is conceived that subject to the enlarged rights and liabilities introduced by the Act, the principles, which regulate the administration of property held for the separate use, will apply equally to any property which by virtue of the late Act belongs to a married woman as her separate estate. Thus, while the old law has to some extent ceased to be applicable to cases governed by the late Act, it will frequently be necessary to refer to it even in connection with property bound by that Act; and as to property acquired before the 1st January, 1883, by women married before that date the law remains unaffected by the Act.

4. In cases not falling within the recent Act] the marital claims * will be defeated if the gift be to [* 756] the wife for her "separate use" (*k*), or "sole and separate use" (*l*),¹ or "solely for her own use" (*m*),² What words will create a trust for separate use.

[*h*] In the Goods of Tharp, 3 P. D. 76.]

[*i*] 45 & 46 Vict. c. 75, s. 1.]

(*k*) *Massy v. Rowen*, 4 L. R. H. L. 294, 299, and 300, *per Cur.*

(*l*) *Parker v. Brooke*, 9 Ves. 583; *Archer v. Rooke*, 7 Ir. Eq. Rep. 478.

(*m*) *Re Tarsey's Trust*, 1 L. R. Eq. 561; *Adamson v. Armitage*, 19 Ves. 416; *G. Coop.* 283; *Ex parte Ray*, 1 Mad. 199; *Ex parte Killick*, 3 Mont. D. & De G. 480; *Davis v. Prout*, 7 Beav. 288; *Arthur v. Arthur*, 11 Ir. Eq. Rep. 511; *Lindsell v. Thacker*, 12 Sim. 178 (the marginal note in the last case is altogether erroneous); and see *Massey v. Parker*, 2 M. & K. 181; — *v. Lyne*, *Younge*, 562; but as to the latter case, see *Tullett v. Armstrong*, 4 M. & Cr. 403; and see *Gilbert v. Lewis*, 1 De G. J. & S. 39; *Lewis v. Mathews*, 2 L. R. Eq. 177. The word "sole" by itself is a word of equivocal and ambiguous meaning, and takes its colour from the context. It has been held, in Ireland, in a recent case, affirmed on appeal by the House of Lords, not to create *per se* a separate use in a gift to a legatee, where at the date of the will the legatee was a *feme sole*; *Massy v. Hayes*, 1 Ir. Rep.

¹ *Petty v. Booth*, 19 Ala. 633.

² *Snyder v. Snyder*, 10 Barr. 423; *Jarvis v. Prentice*, 19 Conn. 273; *Stuart v. Kissam*, 3 Barb. 494.

(which is construed as separate use), or "solely and entirely for her own use and benefit" (*n*), [or "for her sole use and disposal" (*o*), or "for her sole and absolute use and disposal" (*p*),] or for "her livelihood" (*q*), or "that she may receive and enjoy the profits" (*r*), or "to be at her disposal" (*s*), or "to be by her laid out in what she shall think fit" (*t*), or "for her own use, independent of her husband" (*u*), or "not subject to his control" (*v*), or "for her own use and benefit, independent of any other person" (*w*),¹ or "to receive the rents from the tenants while she lives, whether married or single," with a direction that no sale or mortgage should be made during her life (*x*): for such expressions as these are considered inconsistent with the notion of any interference on the part of the husband. So, if the gift be accompanied with such expressions as "her receipt to be a sufficient discharge" (*y*), or "to be delivered to her on demand" (*z*); for in these cases the check put upon the husband's legal right to receive could only have been with the intention of giving the wife a particular benefit. So, if the gift be * to the husband should he be living with his wife but if separate then the half to the husband and the other half to the

Eq. 110. S. C. *nom.* Massy v. Rowen, 4 L. R. H. L. 288. But otherwise where the legatee was known to the testator to be a married woman; Hartford v. Power, 2 Ir. Rep. Eq. 204; [Farrow v. Smith, W. N. 1877, p. 21; *Re Amies' Estate*, W. N. 1880, p. 16.]

(*n*) Inglefield v. Coghlan, 2 Coll. 247.

[(*o*) Bland v. Dawes, 17 Ch. D. 794.]

[(*p*) Baker v. Ker, 11 L. R. Ir. 3.]

(*q*) Darley v. Darley, 3 Atk. 399, *per* Lord Hardwicke; and see Cape v. Capé, 2 Y. & C. 543; *Ex parte* Ray, 1 Mad. 208; but see Lee v. Prieaux, 3 B. C. C. 383; Wardle v. Claxton, 9 Sim. 524, *id. qu.*

(*r*) Tyrrell v. Hope, 2 Atk. 558. But this was in marriage articles, and under special circumstances, and must not be taken to establish any general rule.

(*s*) Prichard v. Ames, T. & R. 222; Kirk v. Paulin, 7 Vin. 96. *Secus* probably if these words had occurred in a gift to a *feme sole*.

(*t*) Atcherley v. Vernon, 10 Mod. 531.

(*u*) Wagstaff v. Smith, 9 Ves. 520.

(*v*) Bain v. Lescher, 1 Sim. 397.

(*w*) Margetts v. Barringer, 7 Sim. 482.

(*x*) Goulder v. Camm, 6 Jur. N. S. 113; 1 De G. F. & J. 146.

(*y*) Lee v. Prieaux, 3 B. C. C. 381; Woodman v. Horsley, cited Ib. 383; Cooper v. Wells, 11 Jur. N. S. 923; *Re Molyneux's Estate*, 6 I. R. Eq. 411; and see Stanton v. Hall, 2 R. & M. 180.

(*z*) Dixon v. Olminus, 2 Cox, 414.

¹ Gillespie Burleson, 28 Ala. 551.

wife "absolutely," for the context shows that by absolutely is meant for the separate use (a).¹

[Where trustees have a discretion to "pay, apply, and dispose of" the income of a trust fund for the maintenance and support of a married woman, they may pay the income to her for her *separate use* (b).]

5. But if the trust be merely "to pay to her," or "to her and her assigns" (c), or the gift be "to her use" (d), or "her own use" (e)², or "her absolute use" (f), or "in trust only for her, her executors, administrators, and assigns" (g), or "to her, her heirs, and assigns, for her or *their* own sole and absolute use" (h), or "to pay into her own proper hands for her own use" (i), or "to pay to her to be applied for the maintenance of herself and such child or children as the testator might happen to leave at his death" (j), there is no such unequivocal evidence of an intention to exclude the husband³.

What words
not sufficient.

6. Where property was vested in the *husband jointly with another*, as general trustees of the will, upon trust (*inter alia*), for the wife, it was held not to be a gift to the wife.

(a) *Shewell v. Dwarries*, Johns. 172.

[(b) *Austin v. Austin*, 4 Ch. D. 233.]

(c) *Dakins v. Berisford*, 1 Ch. Ca. 194; *Lumb v. Milnes*, 5 Ves. 517.

(d) *Jacobs v. Amyatt*, 1 Mad. 376, n.; *Wills v. Sayers*, 4 Mad. 411; *Anon. case*, cited 7 Vin. 96.

(e) *Johnes v. Lockhart*, in note to *Lee v. Prieaux*, 3 B. C. C. 383, ed. by Belt (this case is erroneously cited as an authority to the contrary in *Lumb v. Milnes*, 5 Ves. 520, and *Ex parte Ray*, 1 Mad. 207); *Wills v. Sayers*, 4 Mad. 409; *Roberts v. Spicer*, 5 Mad. 491; *Beales v. Spencer*, 2 Y. & C. C. C. 651; *Darcy v. Croft*, 9 Ir. Ch. Rep. 19.

(f) *Rycroft v. Christy*, 3 Beav. 238.

(g) *Spirett v. Willows*, 3 De G. J. & S. 293.

(h) *Lewis v. Mathews*, 2 L. R. Eq. 177.

(i) *Tyler v. Lake*, 2 R. & M. 183; *Kensington v. Dollond*, 2 M. & K. 184; *Blacklow v. Laws*, 2 Hare, 48; but see *Hartley v. Hurle*, 5 Ves. 545, *contra*.

(j) *Wardle v. Claxton*, 9 Sim. 524.

¹ *Brown v. Johnson*, 17 Ala. 232.

² *Torbett v. Twining*, 1 Yeates, 432; *Tenant v. Storey*, 1 Rut. Eq. 222.

³ The question whether any given limitation will exclude the husband's right is entirely one of intention, and this must be gathered from the whole instrument creating the trust. In *Nix v. Bradley*, 6 Rich. Eq. 48, three classes of expressions were recognized as creating a separate use: 1st, the technical words "sole and separate use," or their equivalents; 2nd, words expressly excluding the husband's marital right over the property, and 3rd, words empowering the wife to perform acts over the estate inconsistent with the disabilities of coverture.

her separate use (*k*). Had the husband *alone* been appointed a trustee for the wife the decision might have been different (*l*).

[Resumption of cohabitation.]

[7. On the resumption of cohabitation in cases where there has been a judicial separation or a protection order, the property to which the wife is entitled when such cohabitation takes place belongs to her for her separate use (*m*).]

Effect after marriage of the trust for separate use.

8. If a *feme sole* marry without having⁴ disposed of the property settled to her separate use, the limitation to the separate use will on the marriage take effect. [* 758] This doctrine is open to much observation * upon principle (*n*), but Lord Cottenham, in the cases of *Tullett v. Armstrong*, and *Scarborough v. Borman* (*o*)¹, anxious to prevent the consequences that would have flowed from a different decision, and not finding any other safe ground upon which to base his judgment, asserted an inherent power in the Court of Chancery to modify estates of its own creation, and in virtue of that jurisdiction established the validity of the separate use in case of the *feme's* marriage. If a fund be given to a *feme sole* for her separate use, without the intervention of a trustee, and she *sells out the fund and invests it in another form, and then marries*, the separate use has been destroyed, and she is regarded as the owner of the new property in the ordinary way (*p*).

Effect of separate use on second marriage.

9. If property be settled, whether by deed or will, to the separate use of a *feme*, and the separate use was meant to be confined to a *particular marriage*, and the

(*k*) *Ex parte* Beilby, 1 Gl. & J. 167; and see *Kensington v. Dollond*, 2 M. & K. 184.

(*l*) *Ex parte* Beilby, *ubi supra*; and see *Darley v. Darley*, 3 Atk. 399.

[(*m*) 20 & 21 Vict. c. 85, s. 25; 21 & 22 Vict. c. 108, s. 8; 41 Vict. c. 19, s. 4; *Re Emery's Trusts*, 50 L. T. N. S. 197; 32 W. R. 357.]

(*n*) Some observations upon this subject will be found in the 3rd edit. p. 124.

(*o*) 4 M. & C. 377; and see *Newlands v. Paynter*, Ib. 408; *Russell v. Dickson*, 2 Drp. & War. 138; *Archer v. Rooke*, 7 Ir. Eq. Rep. 478.

(*p*) *Wright v. Wright*, 2 J. & H. 647.

¹ *Nickel v. Hanley*, 10 Gratt. 336; *Schaforth v. Ambs*, 46 Mo. 114; *Hallett v. Thompson*, 5 Paige, 383. In Pennsylvania it is well settled that a trust for separate use must be created for the benefit of a woman actually married or in immediate contemplation of marriage, and that such a trust will not revive for her protection under a second marriage, although well created so far as the first marriage was concerned. *Yarnall's App.*, 70 Pa. St. 339; *Snyder's App.*, 92 Pa. St. 504; *Wells v. McCall*, 64 Pa. St. 207.

husband dies and the widow marries again, the second husband will not be excluded [by the terms of the instrument] from his ordinary marital rights (*q*). The question simply is, What was the intention of the settlement or will? So, if real or personal estate be devised or bequeathed to A., a married woman, for her sole and separate use independent of her husband B., the separate use applies only to the existing and not to any future coverture (*r*); but if the exclusion of any *future husband* was also in contemplation, it will be carried into effect (*s*); and if the separate use do extend to any marriage, *present or future*, even the *arrears* due to the *feme* at the time of a subsequent marriage are protected from the after-taken husband (*t*)¹. And if a *jointure* or other interest to arise on the cesser of the present marriage be provided for a *feme covert*, it may be so limited as to enure to her separate use, and be inalienable during the *present coverture* (*u*).

* [10. Where policies of assurance on the [* 759] life of the husband were settled for the benefit of the wife during her life for her separate use independently of any future husband with whom she might intermarry, it was held that the trust for the separate use did not arise until after the death of the first husband (*v*).]

11. Where property is settled to the *separate use*, the *feme covert*, unless her power of anticipation be restrained, may, without the concurrence of her trustees, unless the terms of the settlement require it (*w*), deal with the property directly and expressly, precisely in the same

The wife's
separate
estate.

(*q*) *Barton v. Briscoe*, Jac. 603; *Benson v. Benson*, 6 Sim. 126; *Knight v. Knight*, Ib. 121; *Jones v. Salter*, 2 R. & M. 208; *Moore v. Harris*; 4 Drew. 33; *Tudor v. Samyne*, 2 Vern. 270; *Sir E. Turner's case*, 1 Ch. Ca. 307; 1 Vern. 7. And see *Sanders v. Page*, 3 Ch. Rep. 224; *Pitt v. Hunt*, 1 Vern. 18; *Howard v. Hooker*, 2 Ch. Rep. 81; *Edmonds v. Dennington*, cited *Carleton v. Earl of Dorset*, 2 Vern. 17. [But see the Married Women's Property Act, 1882, when the marriage takes place after the 31st December, 1882.]

(*r*) *Moore v. Harris*, 4 Drew. 33.

(*s*) *Ashton v. M'Dougall*, 5 Beav. 56; *Re Gaffee*, 7 Hare, 101; 1 Mac. & G. 541; *Hawkes v. Hubback*, 11 L. R. Eq. 5; *Re Molyneux's Estate*, 6 I. R. Eq. 411.

(*t*) *Ashton v. M'Dougall*, 5 Beav. 56; and see *Newlands v. Paynter*, 4 M. & Cr. 418; *England v. Downs*, 6 Beav. 269.

(*u*) *Re Molyneux's Estate*, 6 I. R. Eq. 411.

(*v*) *King v. Lucas*, 23 Ch. D. 712.]

(*w*) *Grigby v. Cox*, 1 Ves. 518, *per* Lord Hardwicke; *Dowling v. Maguire*, Rep. t. Plunket 19, *per* Lork Plunket.

¹ *Waters v. Tazewell*, 9 Md. 291; *Shirley v. Shirley*, 9 Paige, 364; *Beaufort v. Collier*, 6 Humph. 487.

manner as if she were a *feme sole*.¹ But, at the same time, she will be protected against *fraud*, and, therefore, a settlement procured from her by her husband, upon a false representation, will be set aside (*w*).

General rule. 12. The general principle that governs the law of separate use was laid down by Lord Thurlow, and has been recognised by the highest authorities, viz, that "a *feme covert*, acting with respect to her separate property, is competent to act in all respects as if she were a *feme sole*" (*x*).

Pleadings contract, &c. 13. A *feme covert*, therefore, as regards her separate property, *sues* separately as plaintiff [and since the Married Women's Property Act, 1882, without a next friend (*y*),] and defends separately (*z*), and, if out of the jurisdiction, may be *served with process* by leave of the Court (*a*), may present a *petition* [without a next friend] and without her husband (*b*), and will be bound by a *submission in her pleadings* (*c*), or by a *settlement*

(*w*) Knight v. Knight, 11 Jur. N. S. 618; and see Sharpe v. Foy, 4 L. R. Ch. App. 35.

(*x*) Hulme v. Tenant, 1 B. C. C. 20.

(*y*) And she cannot be compelled to give security for costs where she sues as sole plaintiff, even though she may have no separate estate, and there is nothing upon which, if she fails, available execution can issue; Jacob v. Isaac, W. N. 1885. p. 168; but see *Re Robinson*, W. N. 1885, p. 147.

(*z*) 45 & 46 Vict. c. 75, s. 1 (2): Rules of Supreme Court. Order 16, r. 16; and it is not material whether the contract, in respect of which the action is, was entered into before or after the Act: Gloucestershire Banking Company v. Phillipps, 12 Q. B. D. 533.]

(*a*) Copperthwaite v. Tuite, 13 Ir. Eq. Rep. 68; [Rules of Supreme Court, Order 11.]

(*b*) 45 & 46 Vict. c. 75, s. 1, (2); *Re Outwin's Trusts*, 48 L. T. N. S. 410.]

(*c*) Allen v. Papworth, 1 Ves. 163; Clerk v. Miller, 2 Atk. 379; Bailey v. Jackson, C. P. Cooper's Rep. 1837-8, 495. Husband and wife put in a joint answer, and the wife admitted certain indentures to be in her possession and claimed the estates to which the indentures related to her separate use for her life. The plain-

¹ This rule is law in New York, New Jersey, Connecticut, Kentucky, Virginia, North Carolina, Alabama, Georgia and Missouri. See Church v. Jaques, 17 Johns, 548; Laycraft v. Hedden, 3 Green. Ch. 512; Wells v. Thorman, 37 Conn. 319; Coleman v. Woolby, 10 B. Mon. 320; Vizoneau v. Pegram, 2 Leigh, 183; Newlin v. Freeman, 4 Ired. Eq. 312; Collins v. Lavenberg, 19 Ala. 685; Fear's v. Brooks, 12 Ga. 200; Kirwin v. Weipert, 46 Mo. 532. In Pennsylvania, South Carolina, Rhode Island, Maryland, Tennessee Mississippi it is settled that a *feme covert* has only those powers on her separate estate which are actually and expressly conferred by the settlement. Lancaster v. Dolan, 1 Rawle, 236; Nix v. Bradley, 6 Rich. Eq. 53; Dunn v. Dunn, 1 S. C. 350; Metcalf v. Cook, 2 R. I. 355; Miller v. Williamson, 5 Md. 219; Doty v. Mitchell, 9 Sm. & M. 435; Marshall v. Stephens, 8 Humph. 159.

of accounts (*d*), or by a contract for * pur- [* 760] chase (*e*), or sale (*f*), and may give away the chattels settled to her separate use by manual delivery (*g*), or may lend money to her own husband (*h*), or may demise land settled to her separate use, when the lessee will be protected even at law under the equitable plea against intrusion by the holder of the legal estate (*i*), may dispose of her equitable interest in freehold estate settled to her separate use, without acknowledgment under the Fines and Recoveries Act (*k*), and will be bound as to her separate estate, if she agree verbally to accept a lease and takes possession (which is part performance) under the agreement (*l*), and may be made a contributory under a winding-up order (*m*), and her declarations may be read in evidence against her (*n*), and she will be liable to an attachment for want of answer where she answers separately (*o*), and similarly for disobeying the order of the Court in a suit to which she is a party in respect of her separate estate (*p*), or her separate property may be ordered to be sequestered (*q*).

[14. Since the Married Women's Property Act, 1882, a married woman may by sect. 1, sub-sect. (2), sue or be sued, in contract or in tort, or otherwise, in all respects as

tiff moved for production, but it was argued that the answer was the husband's and could not be read as an admission by the wife. However, the Court said though there was a logical difficulty, there was none in substance: that if the wife claimed the benefit of the separate use she must take it with its disadvantages; and ordered the production by the wife, and that the husband should permit her to produce; *Cowdery v. Way*, V. C. K. B. 2nd Nov. 1843. And see *Callow v. Howle*, 1 De G. & Sm. 531; *Beeching v. Morphew*, 8 Hare, 129; *Clive v. Carew*, 1 J. & H. 207

(*d*) *Wilton v. Hill*, 25 L. J. N. S. Ch. 156.

(*e*) *Picard v. Hine*, 5 L. R. Ch. App. 274.

(*f*) *Davidson v. Gardner*, Sugd. Vend. & Purch. 891, 11th edit.; *Stead v. Nelson*, 2 Beav. 248; and see *Harris v. Mott*, 14 Beav. 169; *Vansittart v. Vansittart*, 4 K. & J. 70; *Milnes v. Busk*, 2 Ves. jun. 498.

(*g*) *Farington v. Parker*, 4 L. R. Eq. 116.

(*h*) *Woodward v. Woodward*, 3 De G. J. & S. 672.

(*i*) *Allen v. Walker*, 5 L. R. Ex. 187.

(*k*) *Pride v. Budd*, 7 L. R. Ch. App. 64.

(*l*) *Gaston v. Frankum*, 2 De G. & Sm. 561; S. C. on appeal, 16 Jur. 507.

(*m*) *Re Leeds Banking Company*, 3 L. R. Eq. 781; and see *Butler v. Cumpston*, 7 L. R. Eq. 16.

(*n*) *Peacock v. Monk*, 2 Ves. 193, per Lord Hardwicke.

(*o*) *Graham v. Fitch*, 2 De G. & Sm. 246; *Taylor v. Taylor*, 12 Beav. 271; *Home v. Patrick* (No. 1), 30 Beav. 405, in which case M. R. observed that if the *feme* had not obtained or concurred in the order to answer separately there might be a difficulty.

(*p*) *Ottway v. Wing*, 12 Sm. 90.

(*q*) *Keogh v. Cathcart*, 11 Ir. Eq. Rep. 280; and see cases cited *Ib*.

if she were a *feme sole*, and her husband need not be made a party to any action or proceeding, and any damages or costs recovered by her in any *such* action or proceeding are her separate property; and any damages or costs recovered against her are payable out of her separate property and not otherwise (*r*). Under this section a married woman may sue without her husband in respect of a tort committed *before* the commencement of the Act, and the damages recovered belong to her as separate property (*s*), but it would seem that if the action were brought by the husband and wife jointly, the section, which applies only to "any *such* action," *i. e.*, an action [* 761] brought by the wife as if * she were a *feme sole*, will not make the damages separate property (*t*). Under this section the right to bring an action in respect of any cause of action within section 7 of the Statute of Limitations, 21 Jas. I. c. 16, which accrued before the passing of the recent Act, commenced at the date of that Act coming into operation, and time runs against the married woman as from that date (*u*).

And every woman has in her own name against all persons, including her husband, the same civil remedies for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*; but no husband or wife is entitled to sue the other for a tort (*v*).] Since the Married Women's Property Act, 1882, the sole undertaking of a married woman as to damages must be accepted where she as sole plaintiff is entitled to an injunction; *Re Prynne*, W. N. 1885, p. 144.

General engagement of a *feme covert* in writing.

15. The Courts have further determined [irrespective of the Married Women's Property Act, 1882,] that if, without any *direct* or *express* reference to her separate property, a *feme covert* who has property settled to her separate use (*w*), professes to bind herself by any *written* instrument, the implication of law is, that she meant to

[*(r)* 45 & 46 Vict. c. 75, s. 1 (2).]

[*(s)* *Weldon v. Winslow*, 13 Q. B. D. 784; *Weldon v. De Bathe*, 14 Q. B. D. 339.]

[*(t)* *Ib.*]

[*(u)* *Weldon v. Neal*, 51 L. T. N. S. 289.]

[*(v)* Sect. 12. An application by a husband against his wife for damages under an undertaking given by her on an injunction which was subsequently dissolved, is not in the nature of an action for tort within this section; *Hunt v. Hunt*, W. N. 1884, p. 243.]

(*w*) As to the power of a married woman to *contract* under 3 & 4 W. 4, c. 74, in respect of her real estate generally, see *Crofts v. Middleton*, 2 K. & J. 194; 8 De G. M. & G. 192; *Pride v. Bubb*, 7 L. R. Ch. App. 64.

charge her separate estate ; for except with reference to that, the instrument was without meaning and nugatory. Thus, if a *feme covert* execute a *bond* (x), even to her husband (y), or join in a bond with another, even with her husband (z), or sign a *promissory note* (a), or *bill of exchange* (b), [or give a guarantee (c),] though she is not *personally* bound, yet her *separate estate*, if anticipation be not restrained (d), is liable. [But if, prior to the recent Act, her anticipation was restrained as to such separate estate as she was entitled to at the time of entering into the engagement, such engagement had no effect either at law or in equity (e).] So, if she gave a written *retainer to a *solicitor*, [*762] it entitles him to have his costs out of her separate estate (f), though the circumstance that the solicitor of a husband and wife has transacted business relating to the separate estate is not, *per se*, sufficient to make that estate directly liable for the amount of his costs (g). And if she enter into a contract in writing for the purchase of an estate, she may enforce it against the vendor, as it creates a valid obligation in respect of her property (h). And it is not necessary that the contract should expressly refer to the separate property, or that the vendor should know that the purchaser was a married woman (i). In one case a *feme* executed a bond *before her marriage*, and her property having been settled upon her marriage to her separate use, the obligee filed his bill against the husband and wife to have the debt paid out of her separate estate, and the husband

(x) *Lillia v. Airey*, 1 Ves. jun. 287; *Norton v. Turvill*, 2 P. W. 144; *Peacock v. Monk*, 2 Ves. 193, *per* Lord Loughborough; *Tullett v. Armstrong*, 4 Beav. 323, *per* Lord Langdale.

(y) *Heatley v. Thomas*, 15 Ves. 596.

(z) *Heatley v. Thomas*, 15 Ves. 596; *Standford v. Marshall*, 2 Atk. 68; *Hulme v. Tenant*, 1 B. C. C. C. 20.

(a) *Bullpin v. Clarke*, 17 Ves. 365; *Field v. Sowle*, 4 Russ. 112; *Tullett v. Armstrong*, 4 Beav. 323, *per* Lord Langdale; *Fitzgibbon v. Blake*, 3 Ir. Ch. Rep. 328; [*Davies v. Jenkins*, 6 Ch. D. 728; *Devitt v. Faussett*, 7 L. R. Ir. 511.]

(b) *Stuart v. Kirkwall*, 3 Mad. 387; *Coppin v. Gray*, 1 Y. & C. C. 205; *Tullett v. Armstrong*, 4 Beav. 323, *per* Lord Langdale; *McHenry v. Davies*, 10 L. R. Eq. 88; *Lancashire and Yorkshire Bank v. Tee*, W. N. 1875, p. 213.

[(c) *Morrell v. Cowen*, 6 Ch. D. 166, reversed on other grounds.]

(d) *Re Syke's Trusts*, 2 J. & H. 415.

[(e) *Roberts v. Watkins*, 46 L. J. N. S. Q. B. 552.]

(f) *Murray v. Barlee*, 4 Sim. 82; 3 M. & K. 209.

(g) *Callow v. Howle*, 1 De G. & Sm. 531; and see *Re Pugh*, 17 Beav. 336.

(h) *Dowling v. Maguire*, Ll. & G. Rep. t. Plunket, 1; but see *Chester v. Platt*, Sugd. Vend. & Purch. 207, 14th edit.

(i) *Dowling v. Maguire*, Ll. & G. Rep. t. Plunket, 1.

having absconded, the Court made the order (*k*). [But the engagement of a married woman has been held not to bind any separate property which she had not already acquired at the time of its being entered into (*l*).]

[Recent Act.] 16. Now by the Married Women's Property Act, 1882, sect. 1, sub-sect (3), every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown; and by sub-sect (4), every contract entered into by a married woman with respect to and to bind her separate property shall bind, not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire. But the contract will not affect property as to which there is a restraint on anticipation (*m*).

It is conceived that if a married woman enters into a contract and her husband dies, and she after his death acquires property, such property will not be bound by a judgment in an action for enforcing the contract, though instituted after the property has been acquired (*n*).

[Costs of raising the charge.]

The liability of the separate estate extends to the costs of an action to enforce the charge against the estate (*o*).]

General engagements not in writing.

17. It has been stated that a *feme covert* makes her [* 763] separate *property liable by the execution of any *written* instrument; and to that extent there can be no question; but the principles upon which the liability was held to attach were until recently involved in much doubt. Thus it was considered by Lord Loughborough (*p*), Sir J. Leach (*q*), and the late Vice-Chancellor of England (*r*), that the separate estate of a *feme covert* was not subject to her *general engagements*, and

(*k*) *Biscoe v. Kennedy*, cited *Hulme v. Tenant*, 1 B. C. C. 17.

(*l*) *Pike v. Fitzgibbon*, 17 Ch. D. 454; *Smith v. Lucas*, 18 Ch. D. 531; *King v. Lucas*, 23 Ch. D. 712.]

(*m*) Sect. 19, and see *post*, p. 787.]

(*n*) See *Re Price*, W. N. 1885, p. 32; and see *ante* p. 753.] *Re Price* is now reported in 28 Ch. D. 709.

(*o*) *Morrell v. Cowen*, 6 Ch. D. 166; and see now 45 & 46 Vict. c. 75, s 1 (2).]

(*p*) See *Bolton v. Williams*, 2 Ves. jun. 142, 150, 156; *Whistler v. Newman*, 4 Ves. 145.

(*q*) See *Greatley v. Noble*, 3 Mad. 94; *Stuart v. Kirkwall*, *Ib.* 389; *Aguilar v. Aguilar*, 5 Mad. 418; *Field v. Sowle*, 4 Russ. 114; *Chester v. Platt*, Sugd. Vend. & Purch. 207, 14th edit.

(*r*) See *Murray v. Barlee*, 4 Sim. 82; and see *Digby v. Irvine*, 6 Ir. Eq. Rep. 149.

this upon the notion that a *feme covert* could not contract, but that every dealing in respect of her estate was in the nature either of an *appointment* or of a *disposition* (s). However, it is clear that [irrespective of the recent Act] a *feme covert* can, in respect of her separate use, contract (t), and that her written obligations are now to be viewed as appointments, and do not operate merely by way of disposition. The principles that govern the liability of a *feme's* separate property have been very satisfactorily explained by Lord Brougham and Lord Cottenham.

Lord Brougham observed, "At first the Court supposed that nothing could touch the separate estate but some real charge, as a mortgage, or an instrument amounting to an execution of a *power*; but afterwards the Court only required to be satisfied that she *intended* to deal with her separate property. Thus, if she only executed a bond, or made a note, or accepted a bill, because those acts would have been nugatory if done by a *feme covert* without any reference to her separate estate, it was held that she must be intended to have designed a charge on that estate, since in no other way could the instruments thus made by her have any validity or operation. But doubts have been, in one or two instances, expressed as to the effect of any dealing, whereby a general engagement only is raised, that is, where she becomes indebted without executing any written instrument at all (u). *I own I can perceive no reason for drawing any such distinction*" (v).

Lord Brougham's exposition of the principles which regulate the liability of the *feme's* separate estate.

* "A writing," says Lord Cottenham, "is [* 764] operative upon a *feme's* separate estate, not by way of the execution of a *power*; for it neither refers to the power, nor to the subject-matter of the power, nor indeed, in many of the cases has there been any power existing at all. Besides, if a married woman enters into several agreements of this sort, and all the parties

Lord Cottenham's view of the principles regulating the liability of the separate estate.

(s) See *Bolton v. Williams*, 2 Ves. jun. 150; *Greatley v. Noble*, 3 Mad. 94; *Stuart v. Kirkwall*, Ib. 389; *Aguilar v. Aguilar*, 5 Mad. 418; *Field v. Sowle*, 4 Russ. 114.

(t) See *Owens v. Dickenson*, Cr. & Ph. 53; *Dowling v. Maguire*, Rep. t. Plunket, 19; *Master v. Fuller*, 4 B. C. C. 19; *Stead v. Nelson*, 2 Beav. 245; *Bailey v. Jackson*, C. P. Cooper's Rep. 1837-8, 495; *Francis v. Wigzell*, 1 Mad. 261; *Crosby v. Church*, 3 Beav. 489; *Tullett v. Armstrong*, 4 Beav. 323.

(u) It may be observed that the late V. C. of England while expressing his opinion upon the hearing below, that the general engagements of the *feme covert* did not affect the separate estate, does not appear to have conceived that any distinction existed between a written and unwritten obligation; see 4 Sim. 94.

(v) *Murray v. Barlee*, 3 M. & K. 223.

come to have satisfaction out of her separate estate, they are *paid pari passu*; whereas, if the instruments took effect as *appointments* under a power, they would rank according to the priorities of their dates. It has sometimes been treated as a *disposing* of the particular estate; but it is not correct, according to legal principles, to say that a contract to pay is to be construed into a contract to pay out of a particular property, so as to constitute a *lien* on that property. The view taken of the matter by Lord Thurlow, in *Hulme v. Tenant* (w), is more correct: viz.—If a married woman has power to deal with her separate property, she has the other power incident to property in general, namely, the power of contracting debts to be paid out of it. I observe that in *Clinton v. Willes* (x). Sir Thomas Plumer suggested a doubt whether it was necessary that the *feme's* engagements should be secured by *writing*. It certainly seems strange that there should be any difference between a contract in writing and a verbal promise to pay, when no statute requires it to be in writing. *It is an artificial distinction not recognised in any other case*" (y).

Result of
judgments
of Lord
Cottenham
and Lord
Brougham.

The judgments of Lord Cottenham and Lord Brougham, before referred to, must be held to have clearly established that the dealings of a *feme covert* with her separate estate do not operate by way of *appointment* or *disposition*, and if this be so, it is difficult to see on what ground any valid distinction can be sustained between *written* and *verbal* engagements. If a written promise to pay, as a promissory note, referring neither to the instrument of trust nor to the property, be held to bind the separate estate, upon what ground can a verbal *assumpsit* be distinguished? So long as it could be maintained that the dealing of the married woman operated by way of *disposition* of the separate estate, there seemed room for contending that the disposition, as being an assignment of trust, must have been in writing (z); but so soon as it is admitted that the general engagement *in writing* binds, it seems impossible to resist the conclusion that a *verbal* general engagement must bind likewise. When it is attempted to imply a promise from mere *acts* of the *feme*, which may be construed as intended to bind either her [* 765] * husband or herself, there seems room for a

(w) 1 B. C. C. 16.

(x) 1 Sugd. Pow. 208, n.

(y) *Owens v. Dickenson*, Cr. & Ph. 53.

(z) See page 761, *supra*.

distinction, but an *express verbal* promise and an *express written* promise to pay must, it is conceived, stand on the same footing.

The late Vice-Chancellor Kindersley, upon this subject expressed himself as follows:—"It has not yet, indeed, been made the subject of positive decision, that the principle embraces a *feme's verbal* engagements or cases of common *assumpsit*. Considering, however, the opinions expressed and the reason of the thing, I think it very probable that when that question arises for decision, it will be decided in the affirmative" (a).

Observations of V. C. Kindersley respecting *feme's verbal* engagements.

[Under the Married Women's Property Act, 1882, no distinction is made between written and verbal engagements and, they both equally bind the separate estate (b).]

But a verbal engagement will not bind the wife where the Statute of Frauds requires, in the case of a *feme sole*, an engagement in *writing*, as if the *feme covert* were to undertake verbally to pay the debt of a stranger, or of her husband, who, for this purpose, is a stranger (c). It has even been held, in Ireland, that the general engagements of the wife *not in writing*, cannot, by reason of the Statute of Frauds, be satisfied out of any interest in *land* settled to her separate use (d). But this seems to involve a confusion between special contracts, which in the case of a *feme sole*, are required by the statute to be in writing, and general contracts, which, in the case of a *feme sole*, are not required to be in writing. In the latter case the remedy is against the *feme sole* personally, but where the *feme* is *covert*, is not against the *person*, but the *property*. The satisfaction, therefore, decreed against the separate estate is not the specific performance of a special contract, but an *equitable execution by way of legal process* for working out the liability created by the general contract.

Cases where a writing is required.

18. It has been considered that there is still another distinction, viz., that, allowing the *general* engagements of the wife, whether written or unwritten, to bind her separate estate, yet, supposing the doctrine of these

Whether separate estate can be made liable by operation of law in clear contravention of the intention.

(a) *Vaughan v. Vandorstegen*, 2 Drew. 183; and see *Wright v. Chard*, 4 Drew. 673; *Newcomen v. Hassard*, 4 Ir. Ch. Rep. 274; *Blatchford v. Woolley*, 2 Dr. & Sm. 204; *Shattock v. Shattock*, 2 L. R. Eq. 182; 35 Beav. 489.

[(b) 45 & 46 Vict. c. 75, s. 1 (3).]

(c) *Re Syke's Trust*, 2 J. & H. 415.

(d) *Burke v. Tuile*, 10 Ir. Ch. Rep. 467; and see *Shattock v. Shattock*, 2 L. R. Eq. 192; *Johnson v. Gallagher*, 2 De G. F. & J. 514.

cases to be founded on the *intention* to charge the settled property as implied by the circumstance that otherwise the act would be nugatory, the same result will not follow where it was clearly *not* the intention of the *feme* to create any charge, where, in short, there was no contract either expressed or implied. [* 766] * Thus it was decided, that where an annuity granted by a *feme covert* and charged upon her separate estate, had been set aside as void for want of compliance with the requisitions of the Annuity Acts, the separate estate was not liable to repay the consideration money (*e*); and the decisions to this effect were cited, without disapprobation, by L. J. Turner (*f*). And where a married woman received rents claiming them as her separate property, but was in fact not entitled, Vice-Chancellor Kindersley held that the rents so received could not be recovered from her separate estate (*g*).

A *feme covert* having separate estate is a *feme sole* to all intents and purposes.

19. The Vice-Chancellor at the same time observed, "The doctrine (of the separate use) is now in a state of transition, and is not clearly established in all its points; but the modern tendency has been to establish the principle, that *if you put a married woman in the position of a feme sole in respect of her separate estate, that position must be carried to its full extent, short of making her personally liable*" (*h*).

[This, however, must be understood in respect only of the separate estate to which the married was actually entitled at the time of the engagement, which it is sought to enforce against her separate estate; for a married woman does not, by *having separate estate*, acquire an equitable *status* of capacity to contract debts, so as to enable her to bind separate estate to which she may afterwards become entitled, but, prior to the Married Women's Property Act, 1882, could only contract with reference to separate estate to which she was actually entitled, and so as to bind that estate (*i*). So where an infant *feme*, in contemplation of her marriage, covenanted to settle all her after-acquired property, and subsequently, after attaining her majority but prior to the Married Women's Property Act, 1882, con-

(*e*) Jones v. Harris, 9 Ves. 486; Aguilar v. Aguilar, 5 Mad. 414; and see Bolton v. Williams, 4 B. C. C. 297; S. C. 2 Ves. jun. 138.

(*f*) Johnson v. Gallagher, 3 De G. F. & J. 513; and see Shattock v. Shattock, 2 L. R. Eq. 182; 35 Beav. 489.

(*g*) Wright v. Chard, 4 Drew. 673.

(*h*) Ib. 4 Drew. 685.

(*i*) Pike v. Fitzgibbon, Martin v. Fitzgibbon, 17 Ch. D. 454.]

firmed the settlement, it was held that this confirmation made the settlement absolutely binding only so far as related to property which she had already acquired at the time of confirmation, but that as to property which she might afterwards acquire for her separate use the covenant would remain voidable, and the married woman might, on such subsequent property accruing, elect to avoid the settlement as to it, and take it for her separate use (*k*).

Now, by the recent Act, a contract entered into by a married * woman will bind not only the separate estate which she has at the date of the contract, but also all separate property which she may thereafter acquire (*l*). The Act does not expressly state whether it affects contracts entered into prior to the commencement of the Act (1st Jan. 1883), for enforcing which proceedings are taken after that date; but the language of the 1st section points to future contracts, and in the absence of express words the Act should be construed so as not to affect liabilities under engagements already in existence at the commencement of the Act (*m*).

But an order made by consent after the commencement of the Act in an action relating to a contract before the Act, whereby all questions under the contract were referred to arbitration, and the parties bound themselves to perform and keep the award, was held to be a new contract, and to be within the Act (*n*).]

20. The principle [affecting cases not within the recent Act,] so far as the authorities have *hitherto gone*, is thus laid down by L. J. Turner. "To affect the separate estate there must be something more than the mere obligation which the law would create in the case of a single woman. What that something more may be must depend in each case upon the circumstances. What might affect the separate estate in the case of a married woman living separate from her husband, might not affect it in the case of a married woman living with her husband," &c. "In order," he continued, "to bind the separate estate by a *general* engagement, it should appear that the engagement was made *with reference to, and upon the faith or credit of that estate, and the question whether it was so or not is to be judged of by*

True principle.

[*(k)* Smith v. Lucas, 18 Ch. D. 531.]

[*(l)* 45 & 46 Vict. c. 75, s. 1 (4).]

[*(m)* Conolan v. Leyland, 27 Ch. D. 632; Turnbull v. Forman, 15 Q. B. D. 234; and see *Re March*, 27 Ch. D. 166.]

[*(n)* Conolan v. Leyland, 27 Ch. D. 632.]

the Court upon all the circumstances of the case" (o). These opinions have since been indorsed by the Court as a correct exposition of the law (p). In a late case Lord Justice James, in further illustration of the subject, observed, "The term *general engagement* is a misleading one. If it merely mean that goods sold to a married woman in the ordinary course of domestic life—that contracts expressed to be made by her in respect of property not her separate estate—*e.g.* for buying * or selling, or letting or hiring a house—do not necessarily impose a liability to be satisfied out of the separate estate which she may happen to have, in that sense and to that extent the proposition that her separate estate is not liable to her general engagements is quite correct. But that does not affect the rule, as laid down by Lord Justice Turner, as to general engagements, as to which it appears that they were made with reference to, and upon the faith or credit of, the separate estate. It would be very inconvenient that a married woman with a large separate property should not be able to employ a solicitor or a surveyor, or a builder or tradesman, or hire labourers or servants, and very unjust if she did that they should have no remedy against such separate property" (q).

[21. Where a married woman is living separate from her husband, and monies are advanced by a stranger in providing her with necessaries, such monies constitute a debt binding her separate estate (r).]

Liability of
estate of *feme*
covert to make
good her
breaches of
trust.

22. The inquiry now under consideration involves the question how far a *feme covert* [could before the Married Women's Property Act, 1882,] commit a *breach of trust* for which her separate estate would be made liable. Where the breach of trust resulted in the loss of the very fund in which the *feme* had an interest to her separate use, the Court treated her acts as amounting to a *disposition* of the separate interest which she

(o) *Johnson v. Gallagher*, 3 De G. F. & J. 515; see the principle approved and explained by Sir R. T. Kindersley, V.C., in *Re Leeds Banking Company*, 3 L. R. Eq. 787; and see the same principle approved by V.C. Malins in *Butler v. Cumpston*, 7 L. R. Eq. 20; and by V.C. in Ireland, in *Hartford v. Power*, 3 L. R. Eq. 602; and by Lord Hatherley in *Picard v. Hine*, 5 L. R. Ch. App. 274.

(p) See *London Chartered Bank of Australia v. Lemprière*, 4 L. R. P. C. 591; and see preceding note.

(q) *London Chartered Bank of Australia v. Lemprière*, 4 L. R. P. C. 593.

[(r) *Hodgson v. Williamson*, 15 Ch. D. 87.]

had power to bind (s). So if a *feme covert* who was *executrix* or *trustee* had wasted the trust estate, the ordinary right of retainer might be exercised against her separate estate under the *same* instrument (t). And the separate estate of a married woman under a settlement was held liable to make good the loss occasioned by her wrongfully selling absolutely a valuable chattel in which under the *same* settlement, she had only a limited interest (u). And the separate estate has been made to answer a debt of the wife *contracted before marriage* (v); and by the Married Women's Property Act, 1870 (w), property belonging to a *feme* and settled by her to her *separate use without power of anticipation*, was made liable to such a debt (x). But where an annuity was devised to a *feme sole* in trust to apply it for the benefit of another, and the *feme* afterwards married and * property was settled to her *separate use*, and then there was a breach of trust in respect of the annuity, the M.R. held that the effect of the marriage was to vest the legal estate of the annuity in the husband, that she could only act as his agent, that she could not be made liable for general torts in reference to trusts any more than for general torts at law—that strictly speaking she could not commit torts, but that they were the torts of her husband, and her acts created a liability against her husband; that he acted for her although she remained trustee, just as the husband of an executrix acted for the executrix, that her receipts must be treated as his receipts, and he alone was liable, and on these grounds the M. R. refused all relief against the separate property of the wife (y).

[23. Now by the recent Act (z), sect. 1, a married woman may be sued in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and any damages or costs recovered against her are payable out of her separate estate, and not otherwise; and by sect. 13, to the extent of her separate estate, her liability continues after her marriage “for all debts contracted,

[Married Women's Property Act, 1882.]

(s) Crosby v. Church, 3 Beav. 485; Hanchett v. Briscoe, 22 Beav. 496.

(t) Pemberton v. M' Gill, 1 Dr. & Sm. 266; and see p. 696, *supra*.

(u) Clive v. Carew, 1 J. & H. 199.

(v) Chubb v. Stretch, 9 L. R. Eq. 555.

(w) 33 & 34 Vict. c. 93, s. 12.

(x) Sanger v. Sanger, 11 L. R. Eq. 470; [London and Provincial Bank v. Bogle, 7 Ch. D. 773.]

(y) Wainford v. Heyl, 20 L. R. Eq. 321.

[(z) 45 & 46 Vict. c. 75.]

and all contracts entered into, or wrongs committed by her before her marriage, including any sums for which she may be liable as a contributory " to any joint stock company ; and by sect. 19, no restriction against anticipation contained in any settlement of a woman's own property to be made by herself is to have any validity against debts contracted by her before marriage, and no settlement is to have any greater force or validity against creditors of such a woman than a like settlement made by a man would have against his creditors; and sect. 24 expressly provides that the provisions of the Act as to liabilities of married women shall extend to all liabilities by reason of any *breach of trust or detestavit* committed by any married woman being a trustee, or executrix or administratrix either before or after her marriage.]

Nature of the relief against the separate estate.

24. Supposing a person entitled to establish his claim against the separate estate, the limits of his remedy appear to be [as follows: Prior to the recent Act he could] not bring an action against the *feme covert* as the sole defendant and as *personally* liable (a). "There is no case," said Sir T. Plumer, "in which this Court has made a *personal* decree against a *feme covert*. She may pledge her separate property, and make it answer. [*770] able for her *engagements; but where her trustees are not made parties to a bill and no particular fund is sought to be charged, but only a personal decree against her, the bill cannot be sustained" (b). But the party aggrieved might have brought an action against her and her trustees (and the death of her husband, which puts an end to the separate use, either after the commencement of the action (c), or even before it (d), would not have defeated the action), and might have prayed payment of his demand out of all *personal estate* in the hands of the trustees to which she was entitled absolutely (including *arrears* of rents), and also out of the *accruing* rents of *real estate*, if there were no clause against anticipation, until the claim and costs had been satisfied (e). "Determined cases,"

[(a) Where a judgment had been obtained against a married woman, it was on her application set aside, after a considerable lapse of time, as being irregular and wrong, *Atwood v. Chichester*, 3 Q. B. D. 722; *Davis v. Ballenden*, 46 L. T. N. S. 797.]

(b) *Francis v. Wigzell*, 1 Mad. 262. [But see *Picard v. Hine*, 5 L. R. Ch. App. 274; *Davies v. Jenkins*, 6 Ch. D. 728.]

(c) *Field v. Sowle*, 4 Russ. 112.

(d) *Heatley v. Thomas*, 15 Ves. 596; but see *Kenge v. Delavall*, 1 Vern. 326.

(e) *Hulme v. Tenant*, 1 B. C. C. 20; *Standford v. Marshall*, 2

said Lord Thurlow, "seem to go thus far, that the general engagement of the wife shall operate upon her *personal property*, shall apply to the *rents and profits of her real estate*, and that her trustees shall be obliged to apply *personal estate, and rents and profits when they arise*, to the satisfaction of such general engagement; but this Court has not used any *direct* process against the separate estate of the wife, and the manner of coming at the separate property of the wife has been by decree to bind the trustees as to personal estate in their hands, or rents and profits, according to the exigency of justice or of the engagement of the wife to be carried into execution." His Lordship then adds, "I know of no case where the general engagement of the wife has been carried to the extent of decreeing that the trustees of her real estate shall make conveyance of *that real estate*, and by *sale, mortgage*, or otherwise, raise the money to satisfy that general engagement on the part of the wife" (*f*). But it is conceived that if in any case the instrument were so specially worded as to place the *corpus* of real estate also at the *separate disposal* of the *feme covert*, the engagements of the wife would, upon principle [independently of the recent Act, have bound] the whole interest settled to the separate use, whether *corpus* or income (*g*).

[A judgment recovered against the separate estate of a married woman in respect of an engagement not within the recent Act, * binds only so much of [* 771] the separate estate as the married woman was entitled to at the time when the engagement was entered into, and as remains undisposed of at the time of the judgment, and does not affect separate estate acquired subsequently to the engagement (*h*). In such a case, therefore, the proper inquiry to be inserted in a judgment against the separate estate is, "what was the separate estate which the married woman had at the time of contracting the debt or engagement, and whether that separate estate or any part of it still remains capable

[Where the property is acquired subsequent to the engagement.]

Atk. 68; Murray v. Barlee, 4 Sim. 82; 3 M. & K. 209; Field v. Sowle, 4 Russ. 112; Nantes v. Corrock, 9 Ves. 182; Bullpin v. Clarke, 17 Ves. 365; Jones v. Harris, 9 Ves. 492, 493, 497; Stuart v. Kirkwall, 3 Mad. 387.

(*f*) Hulme v. Tenant, 1 B. C. C. 20, 21; and see Boughton v. James, 1 Coll. 26; Nantes v. Corrock, 9 Ves. 189.

(*g*) See p. 779 and p. 803, note (*c*).

(*h*) Pike v. Fitzgibbon, 17 Ch. D. 454; reversing S. C. 14 Ch. D. 837; Flower v. Buller, 15 Ch. D. 665; Chapman v. Biggs, 11 Q. B. D. 27; and see as to the effect of the recent Act *ante*, p. 766.]

of being reached by the judgment and execution of the Court" (*i*).

[Where clause against anticipation.]

If there be a clause against anticipation as to any part, the Court directs payment out of the *feme's* separate estate, except that part of which she has no power of anticipation (*k*); and separate estate as to which anticipation was restrained at the time of the engagement, will not become available for the payment by reason of the determination of coverture before the date of the judgment (*l*), and in this respect the law is not altered by the recent Act (*m*).

[Equitable execution without new proceedings]

The remedy against the separate estate is in the nature of equitable execution, which may be obtained either by the appointment of a receiver or by a direction to the trustees to pay, and if any proceedings are pending between the married woman and her creditor, the order may be obtained in such proceedings without instituting a fresh action (*n*).

[Trustee not a necessary party.]

25. The rule that the trustees of the property, held for the separate use of a *feme covert*, must be parties to a suit for charging that property has in recent cases been broken through. Thus, in *Picard v. Hine* (*o*), where the trustee of a particular property was a defendant, the Court made a decree in a general form declaring that the separate property of the *feme covert*, vested in her or in *any other person* in trust for her, was chargeable with the payment of the plaintiff's debt, and in a later case *V.C. Hall*, on the authority of *Picard v. Hine*, held expressly that it was not necessary to make the trustees parties (*p*). But any order [* 772] made in the absence of the * trustees must be without prejudice to any claims they may have against the trust estate (*q*).

[Nor the husband.]

Now, by the recent Act, although the ultimate remedy is only against the separate estate, the action may

[(*i*) *Pike v. Fitzgibbon*, *Martin v. Fitzgibbon*, 17 Ch. D. 454; *Durrant v. Ricketts*, 8 Q. B. D. 177; 30 W. R. 428; *Gloucestershire Banking Company v. Philipps*, 12 Q. B. D. 533; and see *Gallagher v. Nugent*, 8 L. R. Ir. 353.]

[(*k*) *Murray v. Barlee*, 4 Sim. 95.]

[(*l*) *Pike v. Fitzgibbon*, *Martin v. Fitzgibbon*, 17 Ch. D. 454, reversing S. C. 14 Ch. D. 837.]

[(*m*) *Myles v. Burton*, 14 L. R. Ir. 258.]

[(*n*) *Re Peace and Waller*, 24 Ch. D. 405.]

[(*o*) 5 L. R. Ch. App. 274.]

[(*p*) *Davies v. Jenkins*, 6 Ch. D. 728; *Flower v. Buller*, 15 Ch. D. 665; *Durrant v. Ricketts*, 8 Q. B. D. 177; but see *Atwood v. Chichester*, 3 Q. B. D. 722.]

[(*q*) *Collett v. Dickenson*, 11 Ch. D. 687; *Re Peace and Waller*, 24 Ch. D. 405.]

be brought against the married woman as if she were a *feme sole* without joining either her husband or any trustee as a party, and a judgment obtained against the married woman (*r*). This judgment can, however, only be enforced against the separate estate, but it is available (in cases where the engagement in respect of which it is obtained was made after the 31st of December, 1882) against any separate estate of the married woman whether acquired before or after the date of the engagement (*s*).

26. Under the recent Act, judgment in default or under Ord. 14 of the Rules of the Supreme Court may be signed against a married woman, but execution can only issue against her separate estate as to which her anticipation is not restrained (*t*), unless the restraint arises under a settlement made by the married woman herself of her own property (*u*). The judgment should expressly state that "execution is limited to such separate estate as she is not restrained from anticipating, unless such restraint exists under any settlement or agreement for a settlement of her own property made or entered into by herself" (*v*).

27. A person entitled to establish a claim against the separate estate of a *feme covert* cannot obtain an injunction against her to restrain her from dealing with it until his right has been established by obtaining a judgment (*w*).

28. Where] the creditor proceeds not against the *feme covert* personally, but against her separate property as a trust fund, it has been held, though not without a conflict of judicial opinion, that the *Statute of Limitations* does not apply and cannot be pleaded (*x*). [But it is conceived that a married woman may, if sued under the first section of the Married Women's Property Act, 1882, plead the statute of limitations in bar.]

* 29. In one case the Court refused to hold the [* 773] *Bank Annuities* of a *feme covert* liable, as stock could be settled to the separate use.

[*(r)* Brown v. Morgan, 12 L. R. Ir. 122.]

[*(s)* 45 & 46 Vict. c. 75, s. 1; Bursill v. Tanner, 13 Q. B. D. 691; but see Moore v. Mulligan, W. N. 1884, p. 34.]

[*(t)* Perks v. Mylrea, W. N. 1884, p. 64; and as to the practice before the Act, Ortner v. Fitzgibbon, 50 L. J. N. S. Ch. 17; 43 L. T. N. S. 60.]

[*(u)* Bursill v. Tanner, 13 Q. B. D. 691.]

[*(v)* Bursill v. Tanner, 13 Q. B. D. 691.]

[*(w)* Robinson v. Pickering, 16 Ch. D. 660, reversing S. C. 16 Ch. D. 371.]

[*(x)* Norton v. Turvill, 2 P. W. 144; [Hodgson v. Williamson, 15 Ch. D. 87;] Vaughan v. Walker, 6 Ir. Ch. Rep. 471; 8 Ir. Ch. Rep. 458.]

not, in the case of a person *sui juris* be taken in execution (*y*): but now that stock is available to the creditor (*z*), the distinction may be considered as obsolete.

Assignment
good against
creditor.

30. As the process against the separate property of the wife in her lifetime is in the nature of an *equitable execution*, it may, like an execution at law, be defeated by a *bonâ fide* assignment to a purchaser or mortgagee (*a*).

Creditor's
suit after
death of *feme*
covert

31. After the death of the *feme covert* the creditor may bring an action for payment of his debt out of her separate estate (*b*); and Sir W. Grant ruled that all the creditors, whether by specialty or simple contract, should be paid *pari passu* (*c*). But according to Lord Romilly the debts should be paid in order of priority (*d*). Two conflicting principles were in fact then at work in different branches of the Court (*e*): one was, that the general engagements of the wife are charges on the separate property equivalent to so many assignments, and if so, the debts would be payable in order of date: the other was, that the general engagements are not charges, but create a liability, the remedy for which, if the *feme* were *sole*, would be against the person, but as she is *covert*, there is no remedy against the person, but the law gives an equitable execution against the property; and in this view the separate estate would be applicable as assets *pari passu*. Of these two principles the latter is clearly the more correct one (*f*).

[Earnings.]

[32. The earnings of a *feme covert*, which under the Married Women's Property Acts, belong to her for her separate use, are like her other separate estate divisible upon her death amongst her creditors *pari passu* (*g*).]

Funeral ex-
penses.

33. It has been doubted whether the *funeral* expenses of the wife should be thrown upon her separate estate (*h*).

(*y*) *Nantes v. Corrock*, 9 Ves. 182.

(*z*) 1 & 2 Vict. c. 110, s. 14.

(*a*) *Johnson v. Gallagher*, 3 De G. F. & J. 520, *per* L. J. Turner.

(*b*) See *Owens v. Dickenson*, Cr. & Ph. 48; *Gregory v. Lockyer*, 6 Mad. 90.

(*c*) *Apon*. 18 Ves. 258; and see *Johnson v. Gallagher*, 3 De G. F. & J. 520.

(*d*) *Shattock v. Shattock*, 2 L. R. Eq. 182. The decision in this case involved a sum of 14l. 15s. only, so that of course there was no appeal.

(*e*) Compare *Johnson v. Gallagher*, 3 De G. F. & J. 494, and *Shattock v. Shattock*, 2 L. R. Eq. 182.

(*f*) See now the observations of the Court in *London Chartered Bank of Australia v. Lemprière*, 4 L. R. P. C. 594.

[(*g*) *Thompson v. Bennett*, 6 Ch. D. 739.]

(*h*) *Gregory v. Lockyer*, 6 Mad. 90.

34. The *savings* by a *feme covert* out of her separate Savings. estate form part of it, and are equally at her exclusive disposal, or, according to * the language of an [* 774] early authority, "the sprout is to savour of the root and to go the same way" (*i*);¹ and the same has been held with respect to savings out of a maintenance allowed on separation (*k*). Where a fund is settled to the separate use of a married woman and her *anticipation* is *restrained*, as the income when actually accrued is at her absolute disposal, any savings from the income, though invested by her in the names of the trustees of the original settlement, will not be subject to the fetter against anticipation which attached to the *corpus* whence the savings proceeded (*l*). Savings out of money given to the wife by her husband for *household purposes, dress, or the like*, belong to the husband (*m*).

35. A *feme covert* has, as incident to her separate estate, a power to dispose of it, whether it be real or personal, not only by act *inter vivos*, but also by *testamentary instrument* in the nature of a will (*n*). [And her will will be effectual to pass after acquired separate property although she had no separate property at the time of making it (*o*),] and administration with the will annexed (where [no executors are appointed, or where] the executors die in her lifetime), will be granted not to her husband the survivor, but to her residuary legatees (*p*). And if a *feme* leave a will and make bequests, the usual course of administration will be observed. Thus, in the payment of her debts, the undisposed of interest will be first applied, then, general

Power of disposition by will of separate estate.

(*i*) *Gore v. Knight*, 2 Vern. 535; *Molony v. Kennedy*, 10 Sim. 254; *Humphery v. Richards*, 2 Jur. N. S. 432; [*Fitzgibbon v. Pike*, 6 L. R. Ir. 487.]

(*k*) *Brooke v. Brooke*, 25 Beav. 347; and see *Messenger v. Clarke*, 5 Exch. 388.

(*l*) *Butler v. Cumpston*, 7 L. R. Eq. 16.

(*m*) *Barrack v. McCulloch*, 3 K. & J. 114; see *Mews v. Mews*, 15 Beav. 529.

(*n*) *Fettiplace v. Gorges*, 1 Ves. jun. 46; *Rich v. Cockell*, 9 Ves. 369; *Humphery v. Richards*, 2 Jur. N. S. 432; *Moore v. Morris*, 4 Drew. 38; *Pride v. Bubb*, 7 L. R. Ch. App. 64; *Noble v. Willock*, 8 L. R. Ch. App. 778; *S. C. nom. Willock v. Noble*, 7 L. R. H. L. 580; *Taylor v. Meads*, 4 De G. J. & S. 597; [*Bishop v. Wall*, 3 Ch. D. 194.]

[(*o*) *Charlemonte v. Spencer*, 11 L. R. Ir. 347, 490.]

(*p*) [*Brenchley v. Lynn*, 2 Rob. 441; *Re Goods of Maria Bailey*, 2 Sw. & Tr. 135; and see] *Re Goods of Pine*, 1 L. R. P. & D. 388; *Re Goods of M. Fraser*, 2 L. R. P. & D. 183.

¹ *Rush v. Vought*, 55 Pa. St. 437; *Rogers v. Fales*, 5 Barr. 104; *Merritt v. Lyon*, 3 Barb. 110; *Miller v. Williams*, 5 Md. 226; *Young v. Jones*, 9 Humph.; *Hoot v. Sorrell*, 11 Ala. 386.

legacies, and, if there still be a deficiency, the specific legacies (*q*); and general legacies will, it is presumed, as in the ordinary case, carry interest, not from the death of the testator, but from the expiration of one year after the death (*r*). And a general residue will sweep all arrears of income due at the time of the death (*s*).

Separate
estate undis-
posed of
survives to
the husband.

36. If a *feme covert* having personal estate settled to her separate use die without disposing of it the husband [* 775] band will be entitled to it; * as to so much thereof as may consist of cash, furniture, or other *personal chattels*, in his marital right, and as to so much as may consist of "*choses en action*," upon taking out administration to his wife (*t*).

Executors
take as
appointees.

37. If a *feme covert* [in a case not governed by the Married Women's Property Act, 1882, make a will in exercise of a power and] appoint *executors*, they do not take all the separate property *jure representationis*, but as appointees under the power to the extent of the fund appointed (*u*). And therefore if the will do not dispose of [the separate property not subject to the power] the executors take only the [property] disposed of, while the husband takes such chattels as are in possession, and as regards *choses en action* there must be letters of administration (*v*). But if the *feme covert* being possessed of separate personal estate make a will, not under a power, but by virtue of her right as a married woman to dispose of her separate estate, and appoint executors, and direct them to pay legacies, they are entitled to probate, and all the separate estate vests in

[*Secus*, where
will not
under a
power, or
made since
the Married
Women's
Property
Act.]

(*q*) Norton *v.* Turvill, 2 P. W. 144.

(*r*) See Tatham *v.* Drummond, 2 H. & M. 262; the case of a will executing a special power.

(*s*) See Tatham *v.* Drummond, 2 H. & M. 262.

(*t*) Proudley *v.* Fielder, 2 M. & K. 57; Molony *v.* Kennedy, 10 Sim. 254; Bird *v.* Peagram, 13 C. B. 639; Johnstone *v.* Lumb, 15 Sim. 308; Drury *v.* Scott, 4 Y. & C. 264; Askew *v.* Rooth, 17 L. R. Eq. 426; Tugman *v.* Hopkins, 4 Man. & G. 389; Archer *v.* Lavender, 9 I. R. Eq. 220; [see *ante*, p. 752, as to the effect of the Married Women's Property Act, 1882.]

[(*u*) If a married woman execute a power by will, the instrument though in form a will is in fact a conveyance by means of the appointment exercised, and although an executor is appointed, he takes nothing in his character of personal representative, *per* Sir James Hannen, *Re Goods of Tomlinson*, 6 P. D. 209; and on this principle probate has been refused of a will by a married woman appointing real estate under a power and constituting executors; O'Dwyer *v.* Geare, 1 Sw. & Tr. 465; *Re Goods of Barden*, 1 L. R. P. & D. 325; *Re Goods of Tomlinson*, *ubi supra*.]

(*v*) Tugman *v.* Hopkins, 4 Man. & G. 389

them *jure representationis* (*w*). And since the Married Women's Property Act, 1882, if a married woman make a will in execution of a power and also appoint executors they are entitled to probate in general form and the right of the husband to administration *cøterorum* is excluded (*x*).]

38. If a *feme covert*, having income settled to her separate use, lay out the savings in a *purchase of land* Separate use invested on land. in the name of a trustee [or in her own name,] the land on her dying intestate will descend to the heir and not be personal estate in equity for the benefit of the administrator (*y*).

[39. A testamentary appointment by a *feme covert* [Appointment does not pass savings after the termination of the coverture.] will not pass dividends arising after the termination of the coverture from property settled to her separate use for life with a power of * appointment by deed [* 776] or will, and in default of appointment, in the event of her surviving her husband, for her, her executors, administrators, and assigns, or investments which have been acquired by her after the termination of the coverture from the sale and reinvestment of property subject to the power of appointment (*z*).]

40. If the husband receive the wife's separate income, it is clear that neither the wife nor those entitled under her can claim against the husband or his estate, or any one standing in his place (*a*), *more than one year's arrears*, but it is still *sub judice* whether the wife or her representative can claim even so much. Lord Macclesfield (*b*), Lord Talbot (*c*), Lord Loughborough (*d*), Sir W. Grant (*e*), and Lord Chancellor Brady (*f*), held that the wife or her representative could claim nothing. On the other hand, in the judgment of Sir T. Sewell (*g*), Lord Camden (*h*), Lord King (*i*), Lord Hard-

[*(w)* *Brownrigg v. Pike*, 7 P. D. 61.]

[*(x)* *Re Goods of Ievers*, 13 L. R. Ir. 1.]

[*(y)* *Steward v. Blakeway*, 6 L. R. Eq. 479; 4 L. R. Ch. App. 603.

[*(z)* *Mayd v. Field*, 3 Ch. D. 587. See as to the effect of a will, made since the Married Women's Property Act, 1882, by a married woman, of property acquired after the termination of the coverture, *ante*, p. 753.]

[*(a)* *Payne v. Little*, 26 Beav. 1.

[*(b)* *Powell v. Hankey*, 2 P. W. 82.

[*(c)* *Fowler v. Fowler*, 3 P. W. 353. (N. B. A case of pin-money.)

[*(d)* *Squire v. Dean*, 4 B. C. C. 325; *Smith v. Camelford*, 2 Ves. jun. 716.

[*(e)* *Dalbiac v. Dalbiac*, 16 Ves. 126.

[*(f)* *Arthur v. Arthur*, 11 Ir. Eq. Rep. 511.

[*(g)* *Burdon v. Burdon*, 2 Mad. 286, note.

[*(h)* *Ib.* p. 287, note.

[*(i)* *Countess of Warwick v. Edwards*, 1 Eq. Ca. Ab. 140. In.

wicke (*k*), Lord Eldon (*l*), Sir J. Leach, (*m*), Sir J. Stuart (*n*), Lord St. Leonards (*o*), Smith M. R. in Ireland (*p*), and Dobbs, J., in the Landed Estate Court (*q*), the husband's estate is liable to an account for one year (*r*). Where there is such a conflict of authority it is hard to say which way the balance inclines. The better opinion, independently of authority, is thought to be that the wife can recover *nothing* from the husband's estate. Should the husband die *insolvent*, could she recover anything from the trustees on the ground of misapplication? and if the payment was a proper one, why should it be recoverable from the estate of the husband? [*777] band? The * wife's assent must be deemed to continue until revoked by something either expressed or implied¹.

Wife's acquiescence in receipt of her separate income by husband presumed.

41. The principle upon which the relief against the husband's estate is thus denied is, that the Court *presumes* the acquiescence of the wife in the husband's receipt *de anno in annum* (*s*). If, therefore, the wife did not in fact consent to the husband's receipt, but remonstrated and required that the separate income should be paid to herself, the Court will carry back the account of the arrears to the time of the wife's assertion of her claim (*t*). But the Court requires very clear evidence

Thomas v. Bennet, 2 P. W. 341, his Lordship probably held only that *ten years'* arrears could not be given.

(*k*) Townshend v. Windham, 2 Ves. sen. 7; Peacock v. Monk, 2 Ves. sen. 190; Aston v. Aston, 1 Ves. sen. 267.

(*l*) Parkes v. White, 11 Ves. 225; Brodie v. Barry, 2 V. & B. 36.

(*m*) Thrupp v. Harman, 3 M. & K. 513.

(*n*) Lea v. Grundy, 1 Jur. N. S. 953.

(*o*) Property as administered by D. P. p. 169.

(*p*) Corbally v. Grainger, 4 Ir. Ch. Rep. 173; Mackey v. Maturin, 15 Ir. Ch. Rep. 150.

(*q*) Re Kirwan, 1 Ir. Rep. Eq. 553.

(*r*) In Howard v. Digby, 2 Cl. & Fin. 643, 665, Lord Brougham thought that in *separate use*, as distinguished from *pin-money*, the wife or her representatives could recover the whole arrears, but this is clearly untenable; see Arthur v. Arthur, 11 Ir. Eq. Rep. 513. In the same case the V. C. of England, when the cause was before him, hesitated whether the general rule gave an account for a year or none at all; see Digby v. Howard 4 Sim. 601.

(*s*) Caton v. Rideout, 2 H. & Tw. 41; [see Dixon v. Dixon, 9 Ch. D. 587; Re Lulham, 53 L. J. N. S. Ch. 928.]

(*t*) Ridout v. Lewis, 1 Atk. 269; Moore v. Moore, 1 Atk. 272; see Moore v. Earl of Scarborough, 2 Eq. Ca. Ab. 156; Parker v. Brooke, 9 Ves. 583; [Dixon v. Dixon, 9 Ch. D. 587.]

¹ Yardley v. Raub, 5 Whart. 123; McGlinsey's App. 14 S. & R. 64; Naglee v. Ingersoll, 7 Barr, 204; Methodist Church v. Jacques, 3 John. Ch. 77. If the instrument creating the trust direct the payment of the income arising therefrom to the husband, the wife has no claim against his estate for what he has received; Maston v. Barnard, 33 Ga. 520.

that the demand was seriously pressed by the wife, and will not charge the husband's estate from any idle complaints against his receipt which the wife may have occasionally made (*u*). There can be no acquiescence by the wife, and, therefore, no waiver of her rights where the income has not actually come to the hands of the husband, as where it is still in the hands of a receiver (*v*).

42. As the Court proceeds upon the notion of the wife's acquiescence, the question arises where she is *non compos*, and so *incapable* of waiving her right, whether the husband's estate shall not be liable for the entire arrears; and it would seem that in such a case the husband's estate must account for the whole, but will be entitled to an allowance for payments made for the wife's benefit, and which ought properly to have fallen on her separate estate (*w*)¹.

43. In *Howard v. Digby* (*x*)², a woman's *pin-money* was distinguished from ordinary *separate use*, and it was held as to *pin-money* that the wife's *representative* (*y*) could make no claim to any arrears. The ground upon which the House proceeded was that *pin-money* was for the personal use and ornament of the wife, and the husband had a right to see the fund properly applied, and that if the husband himself found the necessaries for which the *pin-money* was intended, the wife or her representative could have no claim against the husband's estate when the requirements for her personal use and ornament had ceased (*z*). Lord St. Leonards has justly questioned these principles (*a*), and it remains to be seen whether any distinction * between *pin-money* and *separate use* generally [* 778] can be maintained.

(*u*) *Thrupp v. Harman*, 3 M. & K. 512; *Corbally v. Grainger*, 4 Ir. Ch. Rep. 173.

(*v*) *Foss v. Foss*, 15 Ir. Ch. Rep. 215.

(*w*) *Attorney-General v. Parnter*, 3 B. C. C. 441; 4 B. C. C. 409; *Howard v. Digby*, 2 Cl. & Fin. 671, 673.

(*x*) 2 Cl. & Fin. 684; 4 Sim. 588.

(*y*) Lord Brougham considered that the wife herself might in her lifetime have recovered one year's arrears; see 2 Cl. & Fin. 643, 653, 659.

(*z*) See too *Aston v. Aston*, 1 Ves. sen. 267; *Fowler v. Fowler*, 3 P. W. 355; *Barrack v. McCulloch*, 3 K. & J. 110.

(*a*) Law of Property as administered by D. P., p. 162.

¹ In *Erisman v. Directors of the Poor*, 47 Pa. St. 509, the Court directed the application of the income of the estate of an insane woman to her support where her husband was in indigent circumstances.

² *Miller v. Williams*, 5 Md. 219, 231.

Gift of *corpus*
to husband
not pre-
sumed.

44. As regards the *corpus* of the separate estate no presumption arises in favour of a husband who has received it. He is *primâ facie* a trustee for his wife, and a gift from her to him will not be inferred without clear evidence (*b*)¹. [Thus, where a legacy bequeathed to the separate use of a wife was paid by a banker's draft payable to her order, and she indorsed the draft and handed it over to her husband, who paid it into his own bank, and had the amount carried over to a deposit account in his name, it was held that this was not sufficient to deprive the wife of her right (*c*). So where shares in a company, which were appropriated to a married woman as part of her share of a residue bequeathed to her for her separate use, were transferred into the name of the husband, and he made an entry in his ledger that the shares were part of his wife's portion of the testator's estate, the separate use of the wife was not destroyed (*d*); and the husband's estate was held liable for the proceeds of new shares which had been allotted in respect of the old shares, and had been sold by him (*e*).] But the employment of the money by the husband in his business and for his family expenditure with the knowledge and assent of his wife, will, in the absence of agreement to the contrary, amount to a gift by her (*f*)². Where a joint account was opened at a bank in the names of the husband and wife, and each of them had power to draw on the account, and each of them had also a separate account at other bankers, and the monies credited to the joint account were chiefly derived from the wife's separate income, it was held that the monies paid in had ceased to be part of the separate estate of the wife; *Re Young*, 28 Ch. D. 705.

Feme not
bound to
contribute to
household
expenses.

45. Occasionally a *feme covert* has a large income from property settled to her separate use, and being of

(*b*) *Rich v. Cockell*, 9 Ves. 369.

(*c*) *Green v. Carlill*, 4 Ch. D. 882.]

(*d*) *Re Curtis*, W. N. 1885, p. 29.] *Re Curtis* is now reported in 52 L. T. N. S. 244.

(*e*) *Re Curtis* (No. 2), W. N. 1885, p. 55.

(*f*) *Gardner v. Gardner*, 1 Giff. 126.

¹ *Lamprey v. Watson*, 43 Ala. 377; *Marsh v. Marsh*, id. 677; *Richardson v. Stodder*, 100 Mass. 528. If the wife join in her husband's receipt for a legacy left to her separate use, no gift thereof to him is to be presumed; *Rowe v. Rowe*, 2 De G. & Sm. 294. If a husband undertake to invest his wife's separate estate as trustee, his is responsible in the character he has assumed; *Walker v. Walker*, 9 Wall. 753.

² *McGlinsey's App.*, 14 S. & R. 64; *Shirley v. Shirley*, 9 Paige, 363; see *Perry on Trusts* (3rd ed.) § 666.

penurious habits accumulates the whole, and yet looks to her much poorer husband for her support. This is a hard case, but it is said that the Court cannot advert to the question whether she accumulates or not (*g*).

[46. Where the house in which the wife resides is settled to her separate use, and the husband has been guilty of improper conduct, and claims to use the house not for the purpose of consorting with his wife, but for his own purposes, the Court will grant an injunction to restrain him from entering the house (*h*).] [Trespass on wife's separate property.]

And a married woman, in the sole occupation of a house bought out of her own earnings, can sue a stranger for a trespass in having entered the house without her leave, even though the entry was made under the authority of her husband (*i*).]

* 47. It has never been questioned but that if [** 779*] *personal* estate be given to a *feme covert* for her separate use, her power of disposition extends over the *corpus*; and so, if the income of property be limited to a *feme covert* for her *life*, either in possession or reversion, for her separate use, or if the absolute interest be given to her in reversion for her separate use, if it appear that the separate use applies not only to the income accruing during the *coverture*, but to the life estate, or absolute reversionary interest, the *feme* may aliene the whole life estate, or absolute reversionary interest (*k*). The question in these cases is one of construction only, and therefore if the fund be settled upon trust for a *feme covert* "absolutely," and "during her life for her separate use," her power does not extend beyond the life estate (*l*). But if personalty be limited to the separate use upon a mere contingency (as on the insolvency of the husband, an event which has not yet occurred), it seems that the *feme covert* cannot, *pending the contingency*, aliene or otherwise dispose of her possible interest (*m*). [But since the Married

(*g*) *Re Smith's Trusts*, W. N. 1867, p. 283.

(*h*) *Symonds v. Hallett*, 24 Ch. D. 346; *Green v. Green*, 5 Hare, 400, n.; *Wood v. Wood*, 19 W. R. 1049.]

(*i*) *Weldon v. De Bathe*, 14 Q. B. D. 339.]

(*k*) *Sturgis v. Corp.*, 13 Ves. 190. *Stead v. Nelson*, 2 Beav. 245; *Hanchett v. Briscoe*, 22 Beav. 503; *Stamford, Spalding and Boston Bank v. Ball*, 10 W. R. 196; 4 De G. F. & J. 310; *Dudley v. Tanner*, W. N. 1873, p. 75.

(*l*) *Hanchett v. Briscoe*, 22 Beav. 496; *Crosby v. Church*, 3 Beav. 485; [but see 45 & 46 Vict. c. 75.]

(*m*) *Mara v. Manning*, 2 Jon. & Lat. 311; *Bestall v. Bunbury*, 13 Ir. Ch. Rep. 549; S. C. Ib. 349; *Keays v. Lane*, 3 I. R. Eq. 1; and see *Luther v. Bianconi*, 10 Ir. Ch. Rep. 194; *Re Shakespear*, 33 W. R. 744.

Women's Property Act, 1882, as to cases falling within that Act, a married Women can dispose of a contingent interest (*n*).]

Separate use
in reference
to real estate.

48. As regards *realty* it was formerly held that the *feme covert* could not by virtue of the separate use, if there were no express power, dispose of the freehold, at least not for any larger interest than during her life (*o*), for between real and personal estate it was said there was this distinction, that on the death of the *feme*, in her husband's lifetime, the absolute interest in the personal estate would devolve on the husband, but the inheritance of the real estate would descend upon the heir, who was not to be disinherited but in some formal mode. However, the favour shown anciently to the heir has in later times been disregarded; and at the present day, if lands be conveyed to a trustee and his heirs upon trust as to the *fee simple* for a *feme covert* "for her separate use," she may deal with the fee as if she were a *feme sole*. It is simply a question of intention. A married woman may have limited to her a power of disposition over a *fee simple* estate, and if it appears clearly * that the separate use was meant to extend to the fee, she ought upon principle to be able to deal with the absolute property by virtue of the separate use, whether by act *inter vivos*, or by testamentary instrument, as fully as she might in the case of personal estate (*p*). And so it has now been decided both in Ireland and England (*q*). But the *feme*

[(*n*) 45 & 46 Vict. c. 75, ss. 1, 2, 5.]

(*o*) *Churchill v. Dibben*, 2 Lord Kenyon's Rep. 2d part, 68, p. 84; case cited in *Peacock v. Monk*, 2 Ves. 192; and see 2 Rep. Husb. and Wife, 182, 2nd ed.; 1 Sand. on Uses, 345, 4th ed.; *Lechmere v. Brotheridge*, 32 Beav. 353.

(*p*) *Stead v. Nelson*, 2 Beav. 245; *Wainwright v. Hardisty*, *Ib.* 363; *Baggett v. Meux*, 1 Coll. 138; 1 Ph. 627; see p. 628; *Major v. Lansley*, 2 R. & M. 355. But see *Newcomen v. Hassard*, 4 Ir. Ch. Rep. 274; *Harris v. Mott*, 14 Beav. 169; *Moore v. Morris*, 4 Drew. 38.

(*q*) *Adams v. Gamble*, 11 Ir. Ch. Rep. 269; 12 Ir. Ch. Rep. 102; *Bestall v. Bunbury*, 13 Ir. Ch. Rep. 549; *Hall v. Waterhouse*, 6 N. R. 20; *Atchison v. Lemann*, 23 L. T. 302; *Pride v. Bubb*, 7 L. R. Ch. App. 64; [*Cooper v. Macdonald*, 7 Ch. D. 288;] *Re Smallman*, 8 I. R. Eq. 249; *Taylor v. Meads*, 5 N. R. 348; S. C. 4 De G. J. & S. 597. In the last case the solicitor of the defendants, the tenant for life, an infant remainderman, petitioned for payment of his costs out of the estate, on the ground of his lien, and by an order made in the cause (though the bill had been dismissed), it was declared that the petitioner, as solicitor employed by or on behalf of the defendants to defend the said cause, was entitled to a charge on the premises for the amount at which his costs should be taxed including the costs of the application, and directions were given for the sale with the approbation of

covert is not regarded as a *feme sole* in respect of the *fee simple*, unless it clearly appear from the instrument itself that the *fee simple*, and not the mere life estate, was limited to the separate use (*r*).

[The mere renunciation by an intended husband of his marital rights in his wife's realty is not sufficient to clothe her with a testamentary power, or to constitute a valid declaration of trust of the fee (*s*).

Under the recent Act (*t*), the whole interest in real estate given to a married woman belongs to her as her separate estate, and can be disposed by her accordingly (*u*).

49. If a married woman be equitable tenant in tail in possession of real estate, which is settled to her separate use, she can under the provisions of the Fines and Recoveries Act bar the entail, with the concurrence of her husband (*v*), and the husband's power of concurring will not be affected by his bankruptcy (*w*); and in cases falling within the recent Act the concurrence of the husband is unnecessary (*x*).]

*50. If a legal estate be limited to a married woman for her life for her *sole and separate use*, without the interposition of a trustee, with remainder in tail, the wife is the *sole protector* of the settlement, and the husband's consent in barring the entail is not necessary (*y*).]

51. It still remains to treat of *restraint of anticipation*.

The clause against the *feme's* anticipation is of comparatively modern growth. In *Hulme v. Tenant* (*z*) it was held that a limitation to the separate use simply did not prevent the *feme* from aliening. In *Pybus v. Smith* (*a*) great pains had been taken in framing the

the Court, of a competent part of the estate for raising the costs; *Ex parte Marshall*. Taylor v. Meads, M. R. 6 May, 1865. See Haymes v. Cooper, 33 Beav. 431; Bonser v. Bradshaw, 4 Giff. 260; Wilson v. Round, 4 Giff. 416; and see Allen v. Walker, 5 L. R. Ex. 187.

(*r*) Troutbeck v. Boughey, 2 L. R. Eq. 534.

(*s*) Dye v. Dye, 13 Q. B. D. 147. But see Rippon v. Dawding, Amb. 565, in which case, however, the 7th sect. of the Statute of Frauds was not referred to, and see the observations of L. J. Turner in Field v. Moore, 7 De G. M. & G. 718, 719.]

(*t*) 45 & 46 Vict. c. 75.]

(*u*) As to the cases to which the Act applies see *ante*, p. 751 *et seq.*

(*v*) 3 & 4 Will. 4, c. 74, ss. 15, 40.]

(*w*) Cooper v. Macdonald, 7 Ch. D. 288.]

(*x*) See *supra*, notes (*e*), (*f*).]

(*y*) Keer v. Brown, Johns. 138; [and see 45 & 46 Vict. c. 75.]

(*z*) 1 B. C. C. 16.

(*a*) 3 B. C. C. 340.

separate use, and the income was made payable as the *feme* should by writing *under her proper hand from time to time appoint*, but it was again decided that the *feme* could even then dispose of her interest. After this Lord Thurlow happened to be nominated a trustee of Miss Watson's settlement, and he directed the insertion of the words "*and not by anticipation*" (*b*); from which time this has been the usual formulary, and the effect of it for the purpose of excluding the power of disposition has never been questioned.

No particular form of words required to restrain anticipation.

52. But although these words are now almost universally employed they are not absolutely indispensable, for if the intention to restrain anticipation can be clearly collected from the whole instrument it is sufficient (*c*); as if there be a direction to pay the income to such persons *as the feme shall after it has become due appoint* (*d*), or for her sole separate and *inalienable* use (*e*); [or her receipt to the trustees is to be given after the rents shall become due from time to time (*f*).] But if the limitation be merely to the sole and separate use, or to pay *from time to time* upon her receipt under her own proper hand (*g*), or if the trust be to pay her upon her *personal appearance* (*h*), the *feme* is left at liberty to part with her interest, for such expressions are, as Lord Eldon observed, "only an unfolding of all that is implied in the gift to the separate use" (*i*). Where a testator directs a daughter's share [* 782] of his estate *to be "so settled that she may enjoy the income during her life for her separate use," the trust is *executory*, and the Court will insert a clause against anticipation (*k*); and if upon marriage a fund be articulated to be vested in the wife and a co-trustee in trust for herself, but not to be disposed of *without the*

(*b*) See *Jackson v. Hobhouse*, 2 Mer. 487; *Parkes v. White*, 11 Ves. 221.

(*c*) *Ross's Trust*, 1 Sim. N. S. 199; *Doolan v. Blake*, 3 Ir. Ch. Rep. 349, and cases cited *Ib*.

(*d*) *Field v. Evans*, 15 Sim. 375; *Baker v. Bradley*, 7 De G. M. & G. 597; *Estate of H. H. Molyneux*, 6 I. R. Eq. 411.

(*e*) *D'Oechsner v. Scott*, 24 Beav. 239; *Spring v. Pride*, 10 Jur. N. S. 876; S. C. 4 De G. J. & S. 395.

[(*f*) *Re Smith*, 51 L. T. N. S. 501.]

(*g*) *Ellis v. Atkinson*, 3 B. C. C. 565; *Clarke v. Pistor*, cited *Ib*. 568; *Brown v. Like*, 14 Ves. 302; *Acton v. White*, 1 S. & S. 429; *Witts v. Dawkins*, 12 Ves. 501; *Wagstaff v. Smith*, 9 Ves. 520; *Sturgis v. Corp*. 13 Ves. 190; and see *Scott v. Davis*, 4 M. & Cr. 87; *Hovey v. Blakeman*, cited 9 Ves. 524.

(*h*) *Re Ross's Trust*, 1 Sim. N. S. 196.

(*i*) *Parkes v. White*, 11 Ves. 222.

(*k*) *Re Dunnell's Trusts*, 6 I. R. Eq. 322.

consent of both parties, the wife cannot anticipate without the consent of the co-trustee (*l*).

53. A widow may, after her husband's death (*m*),¹ and a *feme sole* may, before marriage (*n*), dispose absolutely of a gift limited to her separate use, though coupled with words purporting to restrain her power of anticipation; and the principle is briefly this—that wherever a person possessing an interest, however remote a possibility, is *sui juris*, that person cannot be prevented by any intention of the donor from exercising the ordinary rights of proprietorship. The fund may be limited "in trust for the separate use of the *feme*," or "in trust for her, and in the event of her marriage, for her separate use," or "in trust for her separate use in the event of her marriage," without the gift of any estate independently of that contingency; but in all these cases the interest, whether *vested* or *contingent*, is in favour of one who is now *sui juris*, and who therefore cannot be restrained from disposing of property to which she either now is, or may eventually become entitled.

Effect before marriage of the clause against anticipation.

54. It was formerly held by Sir L. Shadwell, that while the *separate use* took effect upon marriage (*o*), the clause against anticipation was nugatory (*p*). Lord Langdale, with more consistency, held that in the absence of alienation during discoverture, both the *separate use* and also the clause against anticipation came into operation upon marriage (*q*). And it was so finally decided by Lord Cottenham on appeal (*r*).²

The clause against anticipation will operate upon the marriage.

55. It was also held in a case (*s*) before Sir L. Shadwell, that if a fund be vested in trustees upon trust to pay the proceeds to such person and for such purposes as a *feme covert* shall, when and as they become due, appoint, but so as not to *charge* or *anticipate* the same, and in default of appointment to pay

Brown v. Bamford.

(*l*) *Hastie v. Hastie*, 2 Ch. D. 304.

(*m*) *Jones v. Salter*, 2 R. & M. 208.

(*n*) *Woodmeston v. Walker*, 2 R. & M. 197; *Brown v. Pocock*, 1b. 210; S. C. 2 M. & K. 189; and see *Massey v. Parker*, 2 M. & K. 174.

(*o*) *Davies v. Thornycroft*, 6 Sim. 420.

(*p*) *Brown v. Pocock*, 5 Sim. 663; *Johnson v. Freeth*, 6 Sim. 423.

(*q*) *Tullett v. Armstrong*, 1 Beav. 1.

(*r*) S. C. 4 M. & Cr. 390; and see *Sanger v. Sanger*, 11 L. R. Eq. 470.

(*s*) *Brown v. Bamford*, 11 Sim. 127.

¹ *Parker v. Converse*, 5 Gray. 336.

² *Wells v. McCall*, 64 Pa. St. 207.

the same into the hands of the *feme* for her *separate use* (without the addition of any words to restrain her [* 783] *power of anticipation*), if *the *feme covert* assign the life estate limited to her *in default of appointment*, it destroys the power, and the restriction upon the anticipation annexed to it is nugatory. Such a doctrine would have led to great inconvenience, as the precedents of the most approved conveyancers were known to have been frequently expressed in that form, and the decision after failing to secure the assent of other judges (*t*) was ultimately reversed on appeal (*u*).¹ The substantial intention was taken to be, that the *payment* into her hands, as well as the *power* to appoint, was not to operate until the annual proceeds had become actually due.

[Release of power of appointment.]

[Where property was held in trust for a married woman for life for her separate use, without power of anticipation, and after her death for such persons as she should by will appoint, it was held by the Court of Appeal in Ireland, reversing the decision of the Judge of first instance, that she could, while under coverture, extinguish the power (*v*).]

Absolute gift followed by restraint of anticipation.

56. Where there is an absolute gift of bank annuities—*i.e.* of a perpetual annuity redeemable by the State, to a married woman, followed by a restraint against anticipation, she cannot aliene during coverture (*w*); and generally where property is given absolutely to a married woman, but clogged with a clause restraining anticipation, [and an intention is shown by the instrument giving the property that the income only is to be paid to her,] she cannot aliene either income or corpus during the coverture (*x*). [But where a testator gave the proceeds of a mixed fund of realty and personalty to trustees upon trust to invest *the residue* after payment of debts, funeral and testamentary expenses, and legacies in specified securities, and to

(*t*) *Moore v. Moore*, 1 Coll. 54; *Harrop v. Howard*, 3 Hare, 624; *Harnett v. Macdougall*, 8 Beav. 187.

(*u*) 1 Ph. 620. The case of *Medley v. Horton*, 14 Sim. 222, was decided before the decision of the Vice-Chancellor in *Brown v. Bamford* had been overruled, and cannot be considered as law.

[(*v*) *Heath v. Wickham*, 5 L. R. Ir. 285; 3 L. R. Ir. 376.]

(*w*) *Re Ellis' Trust*, 17 L. R. Eq. 409; [*Re Bown*, 27 Ch. D. 411.]

(*x*) *Re Ellis' Trust*, 17 L. R. Eq. 412; [*Re Benton*, 19 Ch. D. 277; *Re Sarel*, 4 N. R. 321; *Re Clarke's Trusts*, 21 Ch. D. 748; *Re Bown*, *ubi sup.*]

¹ *Kent v. Plumb*, 57 Ga. 207; *Loring v. Salisbury Mills*, 125 Mass. 138.

pay the income to A. for life, and after her death (which occurred in the testatrix's lifetime) *to divide and pay the said residue* between B. and C., one of whom was a married woman, and there was a declaration that every gift to a married woman was to be for her separate use without power of anticipation, V.C. Bacon drew a distinction between a gift of a sum of money and of a fund producing income, and held that in that case the gift was equivalent to a gift of a sum of money, and that the *restraint against [* 784] anticipation would not prevent the married woman from receiving her share of the residue (*y*).

But this distinction has been disapproved of, and cannot be supported upon principle; and the true test as to whether a clause against anticipation is effectual, to prevent a married woman from requiring the payment or transfer of property given absolutely to her subject to such a restraint, is, whether upon the construction of the whole document the intention is or is not shown that the trustees should retain the property and pay the income to the married woman (*z*). But if the interest of the married woman is reversionary, a clause against anticipation, even though not effectual to interfere with her right to receive the property when it falls into possession, will be an effectual restraint so long as it is reversionary (*a*).

57. A married woman cannot, by a deed acknowledged under the Fines and Recoveries Act, dispose of an interest in land as to which her anticipation is restrained (*b*). But where an equitable estate tail was limited to a married woman for her separate use, and it was also provided that the rents and profits were to be paid to her without power of alienation or anticipation, it was held that this did not prevent her from barring the entail and limiting the equitable fee to herself. For that was not an alienation so as to deprive herself of anything; it was not, strictly speaking, an alienation at all, except in a very wide sense of the term. It

[*(y)* *Re Croughton's Trusts*, 8 Ch. D. 460; *Re Clarke's Trusts*, 21 Ch. D. 748; *Re Taber*, 51 L. J. N. S. Ch. 721; *Re Coombes*, W. N. 1883, p. 169.]

[*(z)* *Re Bown*, 27 Ch. D. 411.]

[*(a)* *Re Bown*, *ubi sup.*]

[*(b)* *Baggett v. Meux*, 1 Ph. 627; *Heath v. Wickham*, 3 L. R. Ir. 376. The Irish statute 4 & 5 William 4, c. 92, s. 69, contains a clause which is not in the English Act, preventing alienation by a married woman where the settlement contains a valid restriction against anticipation. But this was considered by Lord Lyndhurst, L.C., in *Baggett v. Meux*, as an expression by the legislature of what was meant by the English Act.]

[Enlarging equitable entail into an equitable fee.]

was what was always called an enlargement of the estate (c).

[Enlarging long term into a fee.]

58. So a married woman entitled to a long term for her separate use may, if the case falls within the Conveyancing and Law of Property Act, 1881, enlarge the term into a fee simple, notwithstanding her anticipation may be restrained (d).

[Restraint against anticipation not avoided by fraud.]

59. The clause against anticipation cannot be got over even in the case of deliberate fraud by the *feme covert*. Thus where a *feme covert*, by fraudulently suppressing the restraint on anticipation, obtained an advance on the mortgage of property limited to her separate use, it was held upon an application by her that [* 785] the * property was protected against the mortgage by the clause restraining her anticipation (e).]

Court could not discharge the clause against anticipation.

60. Where the clause against anticipation had once attached, even a Court of equity [could not until a recent Act have] discharged it, though alienation [might have been] for the *feme covert's* own advantage (f). An estate so settled may, however, be subject to *paramount equities*, as for raising costs of suit, [or for antenuptial debts (g),] which may enable the Court to direct a sale (h); and in case of adultery by the wife may be dealt with by the Divorce Court under the provisions of 22 & 23 Vict. c. 61, s. 5 (i); and as a married woman whose anticipation is restrained may still employ a *solicitor* to defend her right to the separate use, the solicitor so employed may acquire a lien on the separate estate for his costs thereby incurred (k).

However, in a recent case, where a married woman entitled to the income of a trust fund for her life with a restraint upon anticipation took proceedings for administration of the estate, which were dismissed with costs, Pearson, J., gave the trustees liberty to retain their costs out of the plaintiff's income, and said, "that the restraint on anticipation was intended for the protection of a married woman outside the Court; it was not intended to enable her to do a wrong in the Court

[(c) *Cooper v. Macdonald*, 7 Ch. D. 288.]

[(d) 44 & 45 Vict. c. 41, s. 65 (2) (i).]

[(e) *Thomas v. Price*, 46 L. J. N. S. Ch. 761; *Stanley v. Stanley*, 7 Ch. D. 589; *Cahill v. Cahill*, 8 App. Cas. 420, 427; see S. C. *nom. Cahill v. Martin*, 5 L. R. Ir. 227; 7 L. R. Ir. 361.]

[(f) *Robinson v. Wheelwright*, 21 Beav. 214; 6 De G. M. & G. 535.

[(g) *London and Provincial Bank v. Bogle*, 7 Ch. D. 773; 45 & 46 Vict. c. 75, s. 19.]

[(h) *Fleming v. Armstrong*, 34 Beav. 109.

[(i) *Pratt v. Jenner*, 1 L. R. Ch. App. 493.

[(k) *Re Keane*, 12 L. R. Eq. 115; and see p. 780, note (b).]

The Court was not fettered by the restriction in the exercise of its powers as to costs." *Re Andrews*, W. N. 1885, p. 142; and see *Re Prynne*, W. N. 1885, p. 144.

[61. Now, by the Conveyancing and Law of Property Act, 1881, s. 39, the Court may, "notwithstanding that a married woman is restrained from anticipation, where it appears to the Court to be for her benefit, by judgment or order, with her consent, bind her interest in any property." [May now under 44 & 45 Vict. c. 41.]

Applications under this section should be made by summons, and not on petition (*l*).

The Court must be satisfied that it will be for the benefit of the wife to accede to the application (*m*), and will not bind her interest where the object is to benefit the husband (*n*); but where a married woman, who was entitled to the income of a fund for her life for her separate use without power of anticipation, with remainder in the events which happened for her appointees by will, and in default of appointment for herself absolutely, had contracted debts and was being harassed by her creditors, the Court made an order binding the property (*o*). The Court has no power simply to remove the restraint; it can only bind the married woman's interest in spite of the restraint, when a *dis- [*786] position is made of the property which the Court considers to be for her benefit (*p*).

Where the Court is satisfied by the evidence of the consent of the married woman, it will not require her separate examination (*q*).]

62. The restraint against alienation may also be void for perpetuity, as if a fund be settled on A.'s marriage upon himself for life, with a power to A. to appoint to his issue, A cannot appoint to his daughters as the issue of the marriage for their sole and separate use *without power of anticipation*, for this would prevent alienation for more than a life in being, and twenty-one years, which the law does not allow (*r*).

Restraint of anticipation void for perpetuity.

[*(l)* *Re Lillwall's Settlement Trusts*, 30 W. R. 243.]

[*(m)* *Re Flood's Trusts*, 11 L. R. Ir. 355.]

[*(n)* *Tamplin v. Miller*, 30 W. R. 422.]

[*(o)* *Hodges v. Hodges*, 20 Ch. D. 749; *Sedgwick v. Thomas*, 48 L. T. N. S. 100.]

[*(p)* *Per Cotton, L. J., Re Warren's Settlement*, 52 L. J. N. S. Ch. 928; 49 L. T. N. S. 696.]

[*(q)* *Hodges v. Hodges*, 20 Ch. D. 749; but see *Musgrave v. Sandeman*, 48 L. T. N. S. 215.]

[*(r)* See *Armitage v. Coates*, 35 Beav. 1, and the cases there cited; and *Re Teague's Settlement*, 10 L. R. Eq. 564; *Re Cunyng-hame's Settlement*, 11 L. R. Eq. 324; *Re Michael's Trusts*, 46 L. J. N. S. Ch. 651; *Re Ridley*, 11 Ch. D. 645, in which case the late

[Where, in a post-nuptial settlement, the trusts were, after the death of the husband and wife and in default of appointment, for sons at twenty-one and daughters at twenty-one, or marriage, but the daughters' shares were for their separate use without power of anticipation, it was held that as to the daughters *in esse* at the time of the settlement the restraint against anticipation was valid (s). So the restraint on anticipation attached to the interests of the children of a woman who, at the date of the will creating the interests, was past child bearing, is valid (t).

[Election where property subject to the restraint.]

63. Opinions have differed as to whether a *feme covert* can be put to her election to give up, or make compensation out of, property as to which her anticipation is restrained, and the authorities on the point are about evenly balanced; but on principle it would seem that the better opinion is that she cannot be called upon to elect (u).]

Settlement of accounts.

64. It has been held that a clause against anticipation, though applicable to the fund when raised, does not prevent a *feme covert* from *adjusting the amount* of the fund with the trustees (v).

Breach of trust.

[*787] *65. Compensation for a breach of trust by a *feme covert* in respect of settled property cannot be enforced, even against a fund limited by the *same settlement* to her separate use without power of anticipation (w).

M. R. followed the previous decisions, though he at the same time expressed his disapproval of them; *Herbert v. Webster*, 15 Ch. D. 610, in which V. C. Hall expressed dissatisfaction with his own decision in *Re Michael's Trusts*.

[(s) *Herbert v. Webster*, 15 Ch. D. 610; and see *Wilson v. Wilson*, 4 Jur. N. S. 1076.]

[(t) *Cooper v. Laroche*, 17 Ch. D. 368.]

[(u) See *Willoughby v. Middleton*, 2 J. & H. 344; *Smith v. Lucas*, 18 Ch. D. 531; *Robinson v. Wheelwright*, 6 De G. M. & G. 535; *Cahill v. Cahill*, 8 App. Cas. 420, 427; S. C. *nom.* *Cahill v. Martin*, 5 L. R. Ir. 227; 7 L. R. Ir. 361; *Re Wheatley*, 27 Ch. D. 606; *Re Vardon's Trusts*, 28 Ch. D. 124;] *Re Queade's Trusts*, 33 W. R. 816.

(v) *Wilton v. Hill*, 25 L. J. N. S. Ch. 156; and in *Stroud v. Gwyer*, M. R. 27 April, 1865, it was ruled that Mrs. Heath, whose share was settled by the will for her separate use without power of anticipation, was bound by a settlement of accounts which had been executed by her. M. S. And see *Derbyshire v. Home*, 3 De G. M. & G. 113.

(w) *Clive v. Carew*, 1 J. & H. 199; *Pemberton v. M'Gill*, 8 W. R. 290; *Sheriff v. Butler*, 12 Jur. N. S. 329; *Arnold v. Woodhams*, 16 L. R. Eq. 29. See however the observations of M. R. (but which were extra-judicial) in *Davies v. Hodgson*, 25 Beav. 186. As to breaches of trust by *femes covert*, see further, *ante*, p. 768.

66. Interest accrues due *de die in diem*; but if the interest, though *due*, be not *payable* under the contract before a particular day, which has not arrived, the interest so accrued is not regarded in the light of arrears but of future income, and therefore the *feme covert*, if anticipation be restrained, has no power over it (x).

67. The clause against anticipation does not prevent the operation of the rule, that if the husband be allowed to receive the wife's income she or her personal representative cannot recover more than one year's income, if so much (y); and the contracts or other engagements of the wife, which would affect her separate use generally, may be enforced against arrears already accrued, and which consequently have become emancipated from the clause against anticipation (z).

[68. The 19th section of the Married Women's Property Act, 1882, provides that nothing in the Act "shall interfere with or render inoperative any restriction against anticipation at present attached, or to be hereafter attached, to the enjoyment of any property or income by a woman" (a); and it is apprehended that the effect of this clause is to prevent property acquired by a married woman after entering into an engagement, but as to which her anticipation is restrained, from being bound under sect. 1 of the Act, although the coverture may have determined before the date of the judgment founded on the engagement (b).]

The section further provides that no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property, to be made or entered into by herself, shall have any validity against debts contracted by her before marriage; and having regard to this clause, judgment against a married woman should be so worded as not to exclude its * operation against property subject to a restraint on anticipation, where such restraint arises under a settlement made by herself (c).

69. A restraint on anticipation in a settlement will not prevent a married woman from exercising any power given to her as tenant for life, or as a person having

(x) *Re Brettell*, *Jollands v. Burdett*, 2 De G. J. & S. 79; 10 Jur. N. S. 349.

(y) *Rowley v. Unwin*, 2 K. & J. 138; see *ante*, p. 776.

(z) *Fitzgibbon v. Blake*, 3 Ir. Ch. Rep. 328; *Moore v. Moore*, 1 Coll. 54.

[(a) 45 & 46 Vict. c. 75.]

[(b) *Myles v. Burton*, 14 L. R. Ir. 258.]

[(c) *Bursill v. Tanner*, 13 Q. B. D. 691; see *ante*, p. 772.]

the powers of a tenant for life by the Settled Land Act, 1882 (d).]

33 & 34 Vict. c. 93. 70. By the Married Women's Property Act, 1870, it was enacted:—

S. 1. That the *wages and earnings* of any married woman acquired or gained after the passing of the Act, 9th August, 1870, in any employment, occupation or trade in which she was engaged, or which she carried on separately from her husband, and also any money or property so acquired by her through the exercise of any literary, artistic, or scientific skill, should be deemed and taken to be property held and settled to her separate use (e).

S. 2. That any *deposit* made or *annuity* granted by the commissioners for the reduction of the national debt after the passing of the Act, in the name of a married woman, or a woman who might marry after such deposit or grant, should be deemed to be her separate property.

S. 3. That any married woman, or any woman about to be married, might cause any sum in the *public stocks or funds*, and not being less than 20*l.*, to which she was entitled, or which she was about to acquire, to be transferred into the books of the Governor and Company of the Bank of England to, or made to stand in her name or *intended name* to her separate use, which should thenceforth be deemed her separate property (f).

[* 789] * S. 4. That any married woman, or woman about to be married, might cause any fully paid up

[(d) 45 & 46 Vict. c. 38, s. 61 (6).]

[(e) In *Ashworth v. Outram*, 5 Ch. D. 923, 939, Lord Coleridge commenting upon this section, observed, "It clearly means to protect the wages and earnings gained or acquired by a woman while married in any employment or trade carried on separately from her husband. It seems to me the Vice-Chancellor was justified in finding as a fact that this person was engaged in an 'employment, occupation or trade,' after the marriage separately from her husband, and the wages and earnings acquired in such employment, occupation or trade, are admitted to be protected. But how far does this carry us? It seems to me that it must carry the protection, I will not say beyond the wages and earnings, but it must carry the protection of the wages and earnings to those things which are necessary to make the wages and earnings which are to be protected. Therefore, the effect of the Act, if fairly construed, is to protect the trade or business of the married woman which she carries on separately from her husband, for without the protection of the trade itself it is manifest that the protection of the wages and earnings of the trade is impossible;" and see *Lovell v. Newton*, 4 C. P. D. 7.]

(f) See *Re Bartholomew's Estate*, 23 L. T. N. S. 433; 19 W. R. 95; *Re Tanner's Trust*, W. N. 1874, p. 198; *Howard v. Bank of England*, 19 L. R. Eq. 295.

shares, or any debenture or debenture stock, or any stock 33 & 34 Vict.
 of an incorporated or joint stock company, *to the hold-* c. 93.
ing of which no liability was attached, to be registered
 in the books of the company in her name or intended
 name to her separate use, which should thenceforth be
 deemed her separate property (*g*).

S. 5. That any married woman, or woman about to be married, might cause any share, benefit, debenture, right or claim in, to, or upon the funds of any *industrial and provident society*, or any *friendly society*, *benefit building society* or *loan society*, to the holding of which share, benefit, or debenture *no liability was attached*, to be entered in her name to her separate use, which should thereupon be deemed her separate property.

S. 7. That where any woman married after the date of the Act should during coverture become entitled to any *personal property as next of kin* (*h*) or any sum not exceeding 200*l.* under any *deed or will*, such property should belong to her for her separate use.

S. 8. That where any *freehold or copyhold property* should descend upon any woman married after the passing of the Act, the *rents and profits* (*i*) thereof should belong to her for her separate use.

S. 10. That a married woman might effect a *policy of insurance* upon her *own life*, or the *life of her husband* for her separate use, and that a policy of insurance effected by any *married man* on his *own life*, and expressed upon the face of it to be for the benefit of his wife or his wife and children, should be deemed a trust for the benefit of the wife for her separate use, and of the children; [and that when the sum secured by the policy should become payable, or at any time previously, a trustee thereof might be appointed by the Court of Chancery, or the Judge of the County Court of the district in which the insurance office was situated, and that the receipt of such trustee should be a good discharge (*k*).]

(*g*) See *The Queen v. Carnatic Railway Company*, 8 L. R. Q. B. 299.

(*h*) The amount coming to her as next of kin appears to be without limit; [so now decided *Re Voss*, 13 Ch. D. 504.]

(*i*) As the rents and profits here mentioned are not limited to those arising during the life of the married woman, it may be open to question whether this provision does not bind the corpus of the property, see *Re Voss*, 13 Ch. D. 504.]

(*k*) Upon an application under this section the Court declared the rights and interests of the wife and children of the deceased, and directed a proper settlement of the fund; *Re Mellor's Policy Trusts*, 6 Ch. D. 127. In this case a husband effected a policy

33 & 34 Vict. c. 93. [* 790] *S. 12. That a husband should not by reason of any marriage after the passing of the Act be liable for the *debts of his wife contracted before marriage (l)*, and that the wife should be liable to be sued for, and any property belonging to her for her separate use should be liable to satisfy such debts, as if she had continued unmarried (*m*).

[37 & 38 Vict. c. 50.] [71. By the Amendment Act of 1874 (*n*), as to marriages which took place after the 30th July, 1874, by the 1st sect. the liability of the husband was restored,

on his own life under the Married Women's Property Act, for the benefit of his wife and children, but the interest they were to take was not expressed on the face of the policy. On an application to the Chancery Division by the widow and children (who were two daughters) V. C. Malins at first appointed two trustees of the policy monies, and declared that they were to hold the monies when received upon trust to pay thereout the costs, and to invest the residue in securities authorized by the Court, and to pay the income to the widow for life for her separate use without power of anticipation, with remainder (as to both capital and income) for the children on attaining 21 or marriage under that age in equal shares, and if but one the whole for that one, with remainder (as to both capital and income) if neither child attained 21 or married under that age for the widow absolutely." But on a subsequent application in the same matter, 7 Ch. D. 200, the V. C. held that the section did not prevent a woman whose husband was dead from taking a share of the capital with the sanction of the Court, and he directed the policy monies to be distributed as in the case of an intestacy. But this case has been disapproved of in *Re Adam's Policy Trusts* 23 Ch. D. 525, where Chitty, J., held that the Court had no jurisdiction under this section to do more than make an order appointing a trustee, and intimated an opinion that a policy by a husband under this section "for the benefit of his wife and children," should be read in conjunction with the section, and that the proper construction was, by virtue of the words "separate use" in the section, for the benefit of the wife for her life with remainder to the children as joint tenants. It is doubtful whether since the act of 1882, this section now remains in force for any purpose (see sect. 11 of that Act *post*) and where the appointment by the Court of a new trustee is required, the petition should be entitled also in the matter of the Trustee Act, and in the matter of the Act of 1882, *Re Soutar's Policy Trusts*, 26 Ch. D. 236.]

(*l*) See *Conlon v. Moore*, 9 I. R. C. L. 190. [If the husband survive the wife and takes out administration to her estate, he will, notwithstanding this section be liable to the extent of her assets to the wife's antenuptial debts; *Turner v. Caulfield*, 7 L. R. Ir. 347; and these debts will be payable *pari passu* out of the wife's separate estate and her general personal estate, S. C.]

(*m*) The separate property will be made available for payment of the debts [even although anticipation be restrained, *London and Provincial Bank v. Bogle*, 7 Ch. D. 773;] but the *feme covert* herself cannot be made a bankrupt, *Ex parte Holland*, 9 L. R. Ch. App. 307, [unless she be trading separately from her husband, 45 & 46 Vict. c. 75, s. 1.]

[(*n*) 37 & 38 Vict. c. 50.]

but by the subsequent sections his liability is to be confined to the extent of the fortune of the wife received, or which ought to have been received, by him, if he pleads that limit to his ability; but it is in the option of the husband either to claim this limit to his liability or not, and if he do not so claim it, he will be liable for the wife's debts in the same manner as the husband originally was at common law. It follows, that where the case falls under the Act of 1874, in a statement of claim by a creditor of the wife against the husband and wife it is not necessary for the plaintiff to allege that the husband has received or with reasonable diligence might have received assets of the wife, * but [* 791] the husband if he intends to rely upon the Act must claim the benefit of it in his defence (o).

72. The Married Women's Property Act, 1870, and the Amendment Act of 1874, have now been repealed by the Married Women's Property Act, 1882, but without prejudice to "any act done or right acquired while either of such Acts was in force, or any right or liability of any husband or wife, married before the 1st January, 1883, to sue or be sued under the provisions of the repealed Acts, for or in respect of any debt, contract, wrong, or other matter or thing whatsoever, for or in respect of which any such right or liability shall have accrued" before that date (p). It will therefore still be necessary in many cases to refer to the provisions of the repealed Acts.

73. By the Married Women's Property Act, 1882, it is in effect enacted:— [45 & 46
Vict. c. 75.]

S. 1. subs. (5). That every married women carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws as if she were a *feme sole* (q).

S. 3. That any money or other estate of the wife lent by her to her husband shall be treated as assets of his estate in case of his bankruptcy, she being entitled to a dividend as a creditor for the amount or value of such money or estate after all claims of the other creditors for valuable consideration have been satisfied.

S. 6. That all deposits in any post office or other savings bank, or in any other bank, all annuities

[(o) See *Matthews v. Whittle*, 13 Ch. D. 811. The liability of the husband ceases on the death of the wife; *Bell v. Stocker*, 10 Q. B. D. 129.]

[(p) 45 & 46 Vict. c. 75, s. 22.]

[(q) As to the position before the Act of a married woman in regard to the bankrupt law; see *Ex parte Jones*, 12 Ch. D. 484.]

[45 & 46
Vict. c. 75.]

granted by the Commissioners for the Reduction of the National Debt or by any other person, and all sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England, or of any other bank, which, at the commencement of the Act (1st January, 1883), are standing in the sole name of a married woman, and all shares, stock, debentures, debenture stock, or other interests of or in any corporation, company, or public body, municipal, commercial, or otherwise, or of or in any industrial, provident, friendly, benefit, building, or loan society, which at the commencement of the Act are standing in her name (r), shall be deemed, unless and until the contrary be shown, to be the separate property of such married woman; and the fact that such property is standing in the sole [* 792] name of a married woman * shall be sufficient *prima facie* evidence that she is beneficially entitled thereto for her separate use, so as to empower her to receive or transfer the same, and to receive the dividends, interest, and profits thereof, without the concurrence of her husband, and to indemnify persons mentioned in the Act in respect thereof.

S. 7. That all such deposits, annuities, sums, shares, stock, debentures, debenture stock, and other interests as referred to in the last section, which after the commencement of the Act shall be allotted to or made to stand in the sole name of a married woman shall be deemed, unless and until the contrary be shown, to be her separate property, in respect of which so far as any liability may be incident thereto her separate estate shall alone be liable.

But nothing in the Act is to require or authorize any corporation or company to admit any married woman to be a holder of any shares or stock therein, to which any liability may be incident, contrary to the provisions of the instrument regulating such corporation or company.

S. 8. That the provisions of sects. 6 and 7 shall apply, so far as relates to the estate, right, title, or interest of the married woman, to any deposits, &c., in the name of any married woman jointly with any persons or person other than her husband.

S. 9. That it shall not be necessary for the husband of any married woman in respect of her interest to join in the transfer of any deposit, &c. affected by the 6th, 7th, or 8th sects.

[(r) This is apparently an error for "sole name."]

S. 11. That a married woman may effect a policy [45 & 46 Vict. upon her own life or the life of her husband for her c. 75.] separate use.

And that a policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named. And that the insured may by the policy, or by any memorandum, appoint a trustee or trustees of the monies payable under the policy, and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof, and for the investment of the policy monies; and that in default of any such appointment such policy shall vest in the insured in trust for the purposes aforesaid. If, at any time, there shall be no trustee, or it shall be expedient to appoint a new trustee or new trustees the appointment may be made by any Court having jurisdiction under the Trustee Act, 1850, or the Acts amending the same.

* S. 13. That a woman after her marriage [* 793] shall continue liable to the extent of her separate estate for her ante-nuptial debts, contracts, or wrongs, and may be sued accordingly, and all sums recovered against her shall be payable out of her separate property, and as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be primarily liable (r).

S. 14. That a husband shall be liable for his wife's ante-nuptial debts, contracts and wrongs, to the extent of her property which he shall have acquired or become entitled to, from or through his wife, after deducting payments made by him, and sums for which judgment may have been recovered against him, in respect of such debts, contracts, or wrongs (s).

S. 15. That a husband and wife may be jointly sued in respect of any such debt or liability if the plaintiff shall seek to establish his claim against both of them.

(r) Under this section a husband cannot maintain an action against his wife for money lent to her or money paid for her before their marriage at her request; *Butler v. Butler*, 14 Q. B. D. 831.

[(s) It will be observed that the language of the 14th section, the effect of which is given shortly in the text, differs materially from that of the Act of 1874, and *Matthews v. Whittle*, 13 Ch. D. 811, has no application to a case under the Act of 1882.]

S. 21. That a married woman having separate property shall be subject to all such liability for the maintenance of her children and grandchildren (*t*) as the husband is now by law subject to for the maintenance of her children and grandchildren: provided that nothing in the Act shall relieve her husband from any liability imposed upon him by law to maintain her children or grandchildren.

Various other important provisions of the Act are incorporated into this work in places which seemed convenient. For the provisions of minor importance the Act should be referred to.

[Agricultural
Holdings
Act.]

74. The Agricultural Holdings (England) Act, 1883 (*u*), enacts in sect. 26, that "a woman married before the commencement of the Married Women's Property Act, 1882, entitled for her separate use to land, her title to which accrued before such commencement as aforesaid, and not restrained from anticipation, shall for the purposes of this Act be in respect of land as if she were unmarried." And that "where *any other woman* married before the commencement of the Married Women's Property Act, 1882, is desirous of doing any act under this Act in respect of land, her title to which accrued before such commencement as aforesaid, her husband's concurrence shall be requisite," and she is to be separately examined by the County Court, for the place, where she for the time being is:

[* 794] * The words "any other woman" here used are inaccurate, but are apparently intended to apply to a woman who does not under the preceding clause acquire the powers of an unmarried woman. It is, however, conceived that there is nothing in the section empowering a married woman whose anticipation is restrained to bind her interest.

By the same section the County Court is empowered to appoint, and change or remove any next friend of a married woman required for the purposes of the Act (*v*)¹.]

[(*t*) The corresponding section in the Act of 1870, did not include grandchildren, *Coleman v. Overseers of Birmingham*, 6 Q. B. D. 615.]

[(*u*) 46 & 47 Vict. c. 61.]

[(*v*) 46 & 47 Vict. c. 61, s. 26.]

¹ The emancipation of the married woman from her disabilities as to property is not as complete in the United States generally as in England. Some States have adopted laws which go quite as far as the Statute of 45 & 46 Vict. c. 75. While it is impossible here to consider the details of the law upon this subject in each of the States, it may be said that in many of them

SECTION VII.

OF JUDGMENTS AGAINST THE CESTUI QUE TRUST.

BEFORE entering upon this topic, it may be useful to notice briefly how *legal* interests stand affected by judgments.¹ Writs of execution at common law.

1. At *common law* the plaintiff in the action had only two writs of execution open to him against the property of the defendant; the *fiery facias*, to levy the debt *de bonis et catallis*; and the *levary facias*, to levy it *de terris et catallis* (*w*). The execution under the latter writ, however, embraced no interest in *land* of a higher

(*w*) Finch's Law, 471.

the result of legislation is as follows: In respect to her separate estate a married woman is capable of contracting for necessities and for the use, benefit and improvement of that estate; she may engage, as if a *feme sole*, in any trade or business; she may sue or be sued without the joinder of her husband; and she may devise or bequeath her separate estate as freely as if unmarried. The husband's right of courtesy is, however, generally reserved to him in her lands, so that in all conveyances of her real estate it is necessary that he should join. In regard to contracts of guarantees and suretyship also she is still under some disabilities. See Perry on Trusts (3rd Ed.) § 675 *et. seq.*

¹ Throughout the United States a judgment properly recorded and indexed is a lien upon all interests in real estate, legal or equitable, possessed by the defendant at the time of its entry. *Lathrop v. Brown*, 23 Iowa, 40; *Logan v. Herbert*, 30 La. An. pt. 1 p. 727; *Carkhuff v. Anderson*, 3 Binn. 4; *Williams v. Downing*, 18 Pa. St. 60. See Freeman on Judgments (3rd Ed.) § 356. Under our system no execution is necessary to perfect the lien; nor to charge the lands in the hands of a purchaser is it necessary that there should be on his part actual knowledge of the existence of the judgment. This is true as to the purchaser of an equitable interest in land. To realize the debt charged on such an interest by a judgment obtained against the cestui que trust, it is the practice in the United States, to sell the interest of the cestui que trust under an execution against him. The purchaser at the sale of such an interest succeeds to the rights and responsibilities of the judgment debtor and to no others. *Cantlin v. Robinson*, 2 Watts. 373; *McMullen v. Wenner*, 16 S. & R. 20; *Purviance v. Lemmon*, 16 S. & R. 294; *Cromwell v. Craft*, 47 Miss. 44; *Stannis v. Nicholson*, 2 Oregon, 332; *Railroad v. Wilson*, 7 Reporter, 243. See Freeman on Judgments (3rd Ed.) § 363. If a binding agreement vests the equitable title to land in A., it is not necessary for the agreement to be recorded, in order to subject his interest to the lien of a judgment against him. *Niantic Bank v. Dennis*, 37 Ill. 381; *Richter v. Selin*, 8 S. & R. 425. When a lien has once been gained no act of the cestui que trust can prejudice the rights of the judgment creditor *Tinney v. Woolston*, 41 Ill. 215; *Morris v. Mowatt*, 2 Pai. Ch. 586.

description than a mere chattel interest, and affected not the *possession* of the lands (*x*), but merely enabled the sheriff, besides taking the chattels, to levy the debt from the present profits, as from the rents payable by the tenants (*y*), and the emblements (*z*), that is, the corn and other crops at the time growing on the lands (*a*). If the sheriff, when he made his return, had not levied the full amount of the debt, a new *levari facias* might have issued, to be executed by the sheriff in like manner (*b*)¹.

Statute of
West-
minster.

[* 795] * 2. In order to provide for the creditor a more effectual remedy, the Statute of Westminster (*c*) introduced the writ of *elegit*, and enacted, that when the debt was recovered or acknowledged, or damages awarded, the suitor should at his *choice* (whence the term *elegit*) have a writ *fieri facias* (*d*), from the debtor's lands and chattels, or that the sheriff should deliver to him all the chattels of the debtor, except his oxen and beasts of the plough, and *one half of his land, until the debt should be levied upon a reasonable price or extent*. It was by virtue of this statute that judgment creditors were first enabled to sue execution of *one moiety of the debtor's lands*, whether vested in

(*x*) *Ib.*; Sir E. Coke's case, Godb. 290.

(*y*) Finch's Law, 472; *Davy v. Pepys*, Plowd. 441.

(*z*) 4 Com. Ab. 118.

(*a*) Harbert's case, 3 Rep. 11 b.; 2 Inst. 304; 2 Bac. Ab. Execution (C) 4, note (*b*).

(*b*) F. N. B. 265.

(*c*) 13 Ed. 1. st. 1. c. 18.

(*d*) This includes the writ of *levari facias*; 2 inst. 395.

¹ There was also another species of *levari facias*, of which the plaintiff might under particular circumstances, have indirectly availed himself. In case the defendant was *outlawed* in the action, the sheriff, on the issuing of the *capias utlagatum*, took an inquisition of the lands of the debtor, and extended their value, and made his return to the *Exchequer*. A *levari facias* from the Crown then followed, commanding the sheriff to levy the extended value *de exitibus*, from the *issues* of the lands, till the plaintiff should be satisfied his debt. These issues were defined to be the "rents and revenues of the land, corn in the grange, and all moveables, except horses, harness, and household stuff;" 13 Ed. 1, c. 39, st. 1; 2 Inst. 453. The sheriff might have agisted or mown the grass; *Britten v. Cole*, 5 Mod. 118, *per* Lord Holt. But if at the date of the inquisition, the agistment was already let, the money agreed to be paid was a sum *in gross*, and was not subject to the *levari facias*; S. C. 1 Raym. 307, *per eundem*. The cattle of a stranger, if *levant and couchant* on the land, were seizable under the writ, as included in the word "issues"; S. C. *Ib.* 305. The lands were bound by the *levari facias* from the date of the writ, so that any subsequent disposition, though it served to pass the freehold and possession, yet did not interrupt the king's title to the profits; *Ib.* 307, *per* Lord Holt.

him at the time of the judgment or subsequently acquired.

[Now by the Bankrupt Act, 1883 (e) it is enacted that (1), The sheriff shall not under a writ of *elegit* deliver the goods of a debtor nor shall a writ of *elegit* extend to goods; and (2), No writ of *levari facias* shall hereafter be issued in any civil proceeding.] [*Levari facias* abolished in civil proceedings.]

We now come to the inquiry, what is the effect of judgments upon *equitable* interests.

1. With respect to the *feri facias*, it is clear that under the system of *uses* no relief could have been granted; for the creditor, coming in by operation of law, did not possess that *privity* of estate which could alone confer upon him the right to sue a *subpoena*. During the earlier period of *trusts* the same technical notions prevailed; but Lord Nottingham introduced more liberal principles, and established, what is now law, that a creditor who is prevented from executing the legal process by the interposition of a trust, may come into Chancery, and prosecute an *equitable fieri facias* (f). [*Fieri facias* as regards trusts.]

2. But, as the analogy to law must be strictly pursued, the trust of a chattel could never have been attached in equity until the * *writ of execution* [* 796] was actually sued out; for till that time there was no *lien* upon the debtor's effects, which was the very ground of the application (g). Trusts not bound by it before execution sued out.

3. And as equity only follows, and does not enlarge the law, the judgment creditor has no title to relief where the chattel of which the trust has been created, is not in itself amenable to any legal process. An opinion, indeed, is subjoined to the case of *Horn v. Horn* in Ambler (h), that a trust of *stock* might, before the late Act, have been taken by a judgment creditor in equitable execution; and *Taylor v. Jones* (i), before Sir W. Fortescue, M.R., was even a decision to the same effect; but such a doctrine, inasmuch as stock could not have been reached at law, was clearly con- Nor where the legal estate is not liable.

[(e) 46 & 47 Vict. c. 52, s. 146.]

(f) *Pit v. Hunt*, 2 Ch. Ca. 73; *Anon. case*, cited 1 P. W. 445; and see *Scott v. Scholey*, 8 East, 485; *Estwick v. Caillaud*, 5 T. R. 420; *Kirkby v. Dillon*, C. P. Cooper's Rep. 1837-38, 504; *Simpson v. Taylor*, 7 Ir. Eq. Rep. 182; *Bennett v. Powell*, 3 Drew. 326; *Gore v. Bowser*, 3 Sm. & G. 1; *Smith v. Hurst*, 1 Coll. 705; *Partridge v. Foster*, 34 Beav. 1; *Horsley v. Cox*, 4 L. R. Ch. App. 92.

(g) *Angell v. Draper*, 1 Vern. 399; *Shirley v. Watts*, 3 Atk. 200; *Smith v. Hurst*, 1 Coll. 705; *Partridge v. Foster*, 34 Beav. 1.

(h) Amb. 79.

(i) 2 Atk. 600.

trary to all principle, and afterwards incurred the express disapprobation of Lord Thurlow (*k*), Lord Manners (*l*), Sir W. Mac-Mahon (*m*), Sir Archibald Macdonald (*n*), and Lord Eldon (*o*); Lord Thurlow observing, that the opinion in *Horn v. Horn* was so anomalous and unfounded, that forty such would not satisfy his mind (*p*). However, by the late Act (*q*) various descriptions of property, formerly exempt, are now liable to be taken in execution, and the remedy of the creditor in equity must be deemed to be enlarged accordingly (*r*), and the same statute provides a special procedure for reaching a judgment debtor's interest in stock, whether legal or equitable (*s*).

Equity of redemption.

Whether equity can adopt the *elegit* by analogy.

4. The judgment creditor is entitled to the like relief against the *equity of redemption of a chattel*, as against any other equitable interest in a chattel (*t*).

5. The *elegit* owing its origin to a statute, a doubt may suggest itself *in limine*, whether, when the legislature has passed an enactment against the *legal estate*, a Court of equity can consistently with its general principles, apply by analogy the same provision to the case of a trust. A legal estate, for example, was by Act of Parliament made forfeitable without inquest for treason, and, as the Statute enumerated "*uses*," it was [*797] contended, and seems to be * the better opinion (*u*), that *trusts* also under that expression became forfeitable to the Crown; but it was never suggested that, had "*uses*" not been inserted in the Act, a Court of equity could have subjected trusts to forfeiture by any inherent jurisdiction of its own. But the Act which originated the *elegit* was, like the statute *de donis*, prior to the introduction of the use; and as equity, by analogy to the Statute of Westminster, admitted *entails* and remainders of trusts, why might it not, by analogy

(*k*) *Dundas v. Dutens*, 2 Cox, 240; and see a note of S. C. in *Grogan v. Cooke*, 2 B. & B. 233.

(*l*) *Grogan v. Cooke*, 2 B. & B. 233.

(*m*) *Plaskett v. Dillon*, 1 Hog. 328.

(*n*) *Caillaud v. Estwick*, 2 Anst. 384.

(*o*) *Rider v. Kidder*, 10 Ves. 368.

(*p*) See 2 B. & B. 233.

(*q*) 1 & 2 Vict. c. 110, s. 12.

(*r*) See cases p. 80, note (*b*); and see *Stokoe v. Cowan*, 29 Beav. 637.

(*s*) See *infra*, p. 806.

(*t*) *King v. Marissal*, 3 Atk. 192; *Shirley v. Watts*, Ib. 200; *Burdon v. Kennedy*, Ib. 739; *Thornton v. Finch*, 4 Giff. 515; and see *King v. De la Motte*, For. 162.

(*u*) See *infra*, p. 818.

to another Act of the same statute, allow equitable interests to be affected by *judgments* (v)?

6. It would seem that in Lord Keeper Bridgman's Trusts time a trust was not subject to an *elegit* (w). But it was long ago established that a judgment creditor might redeem a mortgage in fee (x), and it is now equally well settled that he may prosecute his *elegit* against any other equitable interest (y). formerly not subject to *elegit*. *Secus* now.

7. An estate given by A. to trustees *upon trust to convert* into personalty for the benefit of B. has in equity all the properties of *personalty*; and even under the *old law* therefore, a judgment against the person to whom the proceeds of the sale were directed to be paid conferred no lien upon the proceeds (z). Land to be converted into personalty not bound by a judgement.

8. Whether the same principle applied where a judgment was entered up against a person after he had *contracted to sell* real estate was much doubted. Judgment against vendor, after contract to sell.

Upon this subject we have the following opinion of Mr. Serj. Hill:—H. A. S., seised in fee of an estate, subject to his mother's jointure and to younger children's portions, *contracted for the sale* of the property in lots to different purchasers. After the date of * the contract, H. A. S. executed a conveyance [* 798] to trustees, upon trust to convey to the different purchasers, and to invest part of the purchase money in the funds as an indemnity against the jointure and portions and to pay the residue to himself. *Subsequently* Serjeant Hill's opinion.

(v) See *Ryall v. Rolle*, 1 Atk. 184.

(w) See *Pratt v. Colt*, Freem. 139.

(x) *Greswold v. Marsham*, 2 Ch. Ca. 170; *Crisp v. Heath*, 7 Vin. Ab. 52. (The former case has been compared with Reg. Lib. A. 1685, f. 399, and the report appears substantially correct: the latter case has not been found.) *Plucknet v. Kirk*, 1 Vern. 411; Reg. Lib. 1686, B. fol. 181, 184, see *infra*; *Sharpe v. Earl of Scarborough*, 4 Ves. 538, and the cases Ib. 541; *Stileman v. Ashdown*, 2 Atk. 477; *Fothergill v. Kendrick*, 2 Vern. 234; and see *Steele v. Philips*, 1 Beat. 188; *Forth v. Duke of Norfolk*, 4 Mad. 503; *King v. De la Motte*, Forr. 162; *Freeman v. Taylor*, 3 Keb. 307; *Hatton v. Haywood*, 9 L. R. Ch. App. 229.

(y) *Tunstall v. Trappes*, 3 Sim. 286; *Forth v. Duke of Norfolk*, 4 Mad. 504, per Sir J. Leach; Serj. Hill's opinion, Ib. 506, note (a); *Foster v. Blackstone*, 1 M. & K. 311, per Sir J. Leach; and see *Lodge v. Lyseley*, 4 Sim. 70; *Kirkby v. Dillon*, C. P. Cooper's Rep. 1837–38, 504; *Neate v. Duke of Marlborough*, 9 Sim. 60, 3 M. & Cr. 407; *Adams v. Paynter*, 1 Coll. 530; *Lewis v. Lord Zouche*, 2 Sim. 388. *Davidson v. Foley*, 2 B. C. C. 203; 3 B. C. C. 598; and *Plasket v. Dillon*, 1 Hog. 324 (commonly cited upon this subject), were cases of a *legal elegit*, and the judgment creditor was seeking to remove an impediment to the *legal execution* of it.

(z) *Foster v. Blackstone*, 1 M. & K. 297; and see *Browne v. Cavendish*, 1 Jon. & Lat. 633.

to the deed of trust H. A. S. acknowledged a judgment. Mr. Serj. Hill was consulted on the part of the trustees, whether they would be safe in paying the money to H. A. S., as against the judgment of which they *had notice*, and also as against judgments, if any, of which they *had no notice*. The opinion was as follows: "As to the judgment of which the trustees had *notice*, though, to many purposes, the estate agreed to be sold is from the time of the contract the estate of the purchaser; yet I think the vendor is not before payment of the money to be considered a mere trustee, for the estate continues his at *law*, and even in *equity* he has a right to detain it until payment of the purchase money; and, therefore, the judgment creditor hath a right to so much of the purchase money as is sufficient to satisfy the judgment; and the trustees having notice of his right ought to pay it, if the money is in their hands. As to the judgments, if any, of which the trustees have *no notice*, I think a Court of equity will not make them pay the money over again, if they apply it according to the deed of trust, because I think equity in the case of a judgment creditor and a *bonâ fide* purchaser or a trustee without notice, will not interpose on either side, but will leave the law to take its course (a).

Sir J. Leach's
opinion.

And Sir J. Leach appears to have concurred in this opinion, that the vendor's interest after the contract was bound by a judgment; for in *Forth v. The Duke of Norfolk* (b), where a person had mortgaged an estate in fee, and then contracted to sell, and afterwards, before the conveyance, acknowledged a judgment, Sir J. Leach said, "An assignee for valuable consideration is discharged of the claim of the judgment creditor, *unless he had notice of it before the consideration paid*. If A., before the actual conveyance to him, had received *notice* of the judgment, then, being a purchaser of an equitable interest in a freehold estate from the debtor, and not having paid his purchase money, he would have been equally affected with the judgment as the debtor himself; and if he had afterwards paid the whole purchase money to the debtor, he would have still remained liable to the judgment creditor."

Dictum of
Sir L. Shad-
well.

[*799] * But in a subsequent case Sir L. Shadwell said "he should not have given the opinion which the learned Serjeant had done, for it appeared to him that from the time H. A. S. entered into binding contracts to sell the lands, he not having judgments against him

(a) Cited *Forth v. Duke of Norfolk*, 4 Mad. 506, note (a).

(b) 4 Mad. 503.

at that time, the purchasers had a right to file a bill against him and have the legal estate conveyed" (c). And it may be argued that if the vendor die after the contract, but before the conveyance the purchase money would go to the executor (d); and that if the contract work a notional conversion of the land into money in respect of the vendor's representatives, the same consequence ought to follow in respect of the vendor's judgment creditors.¹

9. The case became still more difficult where A. conveyed to trustees upon trust to sell for the discharge of incumbrances, and to pay the surplus to *himself*, and before sale, a judgment was entered up against A. (e); or where a mortgage was given with power of sale to the mortgagee and a judgment was entered up against the mortgagor before sale (f). It was clear that in either case the power of giving receipts was binding as against the judgment creditor, so that a purchaser from the trustee or mortgagee was not concerned to see that the judgments were satisfied (g); but this still left open the question whether the judgment was or not a lien or charge on the proceeds in the hands of the mortgagee or trustee.

Whether in case of conveyance upon trust to sell or mortgage, with power of sale, surplus proceeds are bound by a judgment.

10. The question whether under the old law, the *lien* of the judgment creditor extended to the *whole* or a *moiety* of the trust estate was also one of considerable difficulty, and the authorities can only be reconciled by the aid of a somewhat subtle distinction.

How much of the estate may be taken in execution.

A judgment creditor might have come into a Court of equity upon two grounds. *First*, upon a *legal* title, where he either sought to remove an impediment to the execution of his legal *elegit*, or, after the death of the conusor, sued for payment of his debt out of the conusor's personal assets, and, if they should be insuffi-

On what grounds a judgment creditor may apply to a Court of equity.

(c) *Lodge v. Lyseley*, 4 Sim. 75; and see *Craddock v. Piper*, 14 Sim. 310, where, however, it does not appear whether the judgments were entered up before the actual sale or the decree for sale.

(d) See *Farrar v. Winterton*, 5 Beav. 1; *Curre v. Bowyer*, Ib. 6 note.

(e) See *Bayden v. Watson*, 7 Jur. 245; *Re Underwood*, 3 K. & J. 745.

(f) See *Wright v. Rose*, 2 S. & S. 323, and *Clarke v. Franklin*, 4 K. & J. 260.

(g) *Lodge v. Lyseley*, 4 Sim. 75; *Alexander v. Crosbie*, 6 Ir. Eq. Rep. 513; *Drummond v. Tracy*, Johns. 608.

¹ A purchaser under a judgment against a vendor will be compelled to make a conveyance to the vendee upon precisely the same terms upon which the vendor could have been compelled to convey. See *Freeman on Judgments* (3rd Ed.) § 363.

cient, then by sale (*h*) of the real estate; or, *Secondly*, [**800*] upon an *equitable * elegit*, on the ground that he had no legal *lien*, and therefore could have no legal process (*i*).

Execution of a moiety only of a trust estate.

As the extent of relief ought in both these cases to be the same, and the Court never attempted to make a difference, the authorities determined upon either head may be relied upon as applicable to the other. The result of the cases upon this principle, notwithstanding an early authority to the contrary (*k*), appears to be that a judgment creditor could under the old law sue an *equitable elegit* of a *moiety* only of a trust estate (*l*).

Execution of the whole of an equity of redemption.

11. An *equity of redemption* was, however, governed by a different rule. If A., seised of an estate, mortgaged it to B. in fee, and then confessed a judgment to C., it was clear that C. had a *lien* which entitled him to redeem B. But should he redeem the whole or a moiety? So far as the judgment creditor had any claim of his own, a moiety only; but as B. could not be compelled to part with the smallest fraction of the estate until he had been satisfied his whole debt, C. was under the necessity of redeeming the entirety. Again, when C. had taken a transfer of the security, it followed, that as mortgagee with a judgment against the mortgagor he had a right to tack, and no one could redeem

(*h*) An *elegit* would at law give the possession of the lands till the satisfaction of the debt, but equity assumes the jurisdiction of facilitating the remedy by a sale. See *Barnewall v. Barnewell*, 3 Ridg. 61; *O'Fallon v. Dillon*, 2 Sch. & Lef. 19; *O'Gorman v. Comyn*, Ib. 139; *Stileman v. Ashdown*, 2 Atk. 610; but see *Bedford v. Leigh*, 2 Dick. 709; *Neate v. Duke of Marlborough*, 3 M. & Cr. 417.

(*i*) These grounds of suit still subsist, in addition to that conferred by the 13th section of 1 & 2 Vict. c. 110, giving the judgment creditor a charge in equity. [See *Anglo-Italian Bank v. Davies*, 9 Ch. D. 275.]

(*k*) *Compton v. Compton*, cited in *Stileman v. Ashdown*, Amb. 15; Reg. Lib. A. 1711, f. 134. The authority of this case cannot, however, have much weight, for, as was observed by Lord Hardwicke (*Stileman v. Ashdown*, Amb. 17), the point whether the whole or a moiety should be sold appears not to have been discussed.

(*l*) *Stileman v. Ashdown*, 2 Atk. 477, 608; *Rowe v. Bant*, Dick. 150; Reg. Lib. B. 1750, f. 427; *Barnewall v. Barnewall*, 3 Ridg. P. C. 24; *O'Dowda v. O'Dowda*, 2 Moll. 483; *Anon.* case, Ib.; *O'Gorman v. Comyn*, 2 Sch. & Lef. 137; *Burroughs v. Elton*, 11 Ves. 33; *Williamson v. Park*, 2 Moll. 484; *Armstrong v. Walker*, Ib. In *O'Fallon v. Dillon*, 2 Sch. & Lef. 13, the sale of the estate was not confined to a moiety; but there the creditor had entered up two judgments the same term, and then as both judgments were of the same date, the creditor might at law have taken both moieties in execution. See *Attorney-General v. Andrew*, Hard. 23.

any part of the estate out of his hands until payment, not only of the original mortgage debt but also of the judgment. Thus it arose from a kind of necessity, and not from any wanton violation of principle, that in the instance of an equity of redemption the judgment creditor was paid by a sale of the *whole* estate (m).¹

* In *Stileman v. Ashdown* (n), Lord Hard- [* 801] wicke, at the same time that he gave a judgment creditor a moiety only of the *trust estate*, ordered a sale of the *whole* of the lands in *mortgage* (o). So, where there were several incumbrancers by judgment upon an equity of redemption, and the Court decreed a sale, the first judgment creditor was not confined to a moiety of the estate, but the decree was, that the incumbrancers should be paid their full demands out of the proceeds of the sale, according to their priority (p).

12. There was one species of interest, which though bordering closely upon the nature of an equity of redemption, yet should perhaps have been distinguished from it. In *Tunstall v. Trappes* (q), Trappes, in 1811, appointed an estate to the use that Davis might receive an annuity, and subject thereto, to the use of Withy in fee upon trust, in case the annuity should be in arrear for six months, to sell the premises, and out of the proceeds to purchase an annuity of the same amount for Davis, and pay the surplus, after discharging the existing incumbrances, to Trappes; provided, that in case Trappes should be desirous of repurchasing the annuity, and should pay the price to Davis, then the annuity should cease, and Withy, the trustee, should reconvey. In 1812 Trappes confessed a judgment, and the question was, whether it should affect the whole or only a moiety of the estate; and Sir L. Shadwell, on the ground that a judgment creditor might redeem the entirety of lands in mortgage, held that the *lien* should

Case of a
trust by way
of mortgage.

(m) *Stonehewer v. Thompson*, 2 Atk. 440; *Sish v. Hopkins*, Blunt's Amb. 793.

(n) 2 Atk. 477.

(o) Sir A. Hart, not observing the ground of the distinction, has charged Lord Hardwicke with inconsistency, *Leahy v. Dancer*, 1 Moll. 322.

(p) *Sharpe v. Earl of Scarborough*, 4 Ves. 538; the cases cited Ib. 541; and see *Berrington v. Evans*, 3 Y. & C. 384.

(q) 3 Sim. 286, see 300.

¹ It was ruled, upon a similar principle, that, where freeholds and copyholds were blended in one mortgage, the equity of redemption of the whole was liable as assets to a bond creditor, though copyholds by themselves were not assets; *Acton v. Pierce*, 2 Vern. 480.

extend to the whole. Now, there appears to be this distinction between an equity of redemption and the case just mentioned. In the former, the whole interest is in the mortgagee by non-fulfilment of the condition; and if the judgment creditor redeem the mortgagee, and then the mortgagor come to be relieved against the forfeiture, the Court will impose terms upon the mortgagor, and oblige him to discharge *every lien* upon the estate before he can be permitted to redeem the smallest part. But in *Tunstall v. Trappes* the whole interest was never in the annuitant either at law or in equity. The *legal* estate was limited to a third person in fee, and the *equitable* interest to the extent of securing the annuity only was in trust for the annuitant, but as to all the residue was in trust for the grantor. There was nothing to be redeemed, but merely a trust to be executed. The judgment creditor might take an assign- [* 802] ment of the * annuity, but he had no right to tack the judgment; the grantor could call for a reconveyance from the trustee on payment of the price agreed upon for the annuity, and the Court could impose no terms, for no favour was asked.

Execution of
a trust estate
by *elegit* at
law, under
Statute of
Frauds.

13. We come next to the provision in the 10th section of the Statute of Frauds (*r*), which enables a judgment creditor in certain cases to sue a writ of execution at *law* against an equitable estate.

The 10th section enacts in substance that it "shall be lawful for the sheriff to deliver execution unto the party suing of all such lands and hereditaments as any other person may be in any manner of wise *seised or possessed* in trust for the party against whom execution is so sued, like as the sheriff might or ought to have done, if the said party against whom execution is so sued had been *seised* of such lands and hereditaments of such estate as they are *seised* of in trust for him *at the time of the said execution sued*."

Construction
of the
Statute.

14. Upon the construction of this section the following points have been resolved :—

a. As the statute, though using in one case the words *seised or possessed*, speaks elsewhere only of lands, &c., of which others are *seised* in trust for the debtor, it does not extend to trusts of chattels real of which the legal proprietor is not to be *seised*, but *possessed* (*s*).

(*r*) 29 Car. 2, c. 3.

(*s*) *Lyster v. Dolland*, 3 B. C. C. 478; S. C. 1 Ves. jun. 431; *Scott v. Scholey*, 8 East, 467; *Metcalf v. Scholey*, 2 Bos. & Pul. N. R. 461.

β. An *equity of redemption* is not within the terms of the Act (*t*).

γ. A *bare and simple* trust only is intended—not one of a complicated nature, where the interests of other parties are mixed up with the debtor's title (*u*).

δ. If after the judgment is entered up, but before actual execution, the estate has been disposed of to a purchaser, so that when execution is sued there is no trust for the debtor in *esse*, in that case the words of the statute fail to provide a remedy, and the judgment creditor cannot be put in possession (*v*).

The question has been much discussed whether in the last case, though the judgment creditor could not prosecute a *legal* execution, he might not subject the purchaser, if affected with notice, to an **equi-* [* 803] *table elegit* (*w*). It was said, that as there was no execution at law, and equity followed the law, the creditor was without redress; but in this argument the principle that equity followed the law seems to be wrongly applied. A judgment bound a *legal* estate, and, as equity followed the law, a judgment was therefore in equity a *lien* upon the trust. The Statute of Frauds introduced an additional remedy by enabling the judgment creditor, in certain cases, to take *legal* execution of a trust. But affirmative statutes do not abridge the common law (*x*), and therefore the creation of a *legal* remedy in certain cases provided for by the Act could not preclude the judgment creditor from prosecuting his equitable *elegit* in other cases for which the statute had made no provision. The enactment was clearly meant to be remedial, but the doctrine contended for would impress on it a restrictive character, and convert it into a disabling statute. The difficulty in the way of the relief was said to be, that no instance of it could be found after the most diligent search. The reason probably was, that judgments had only in modern times been held to bind equitable interests at all; the doctrine was certainly not established before the Statute of Frauds. But the system of trusts had from that period downwards been gradually maturing, and the principles which governed uses, and were thence trans-

Whether equitable *elegit* may be had where no legal *elegit* of a trust under the Statute.

(*t*) *Lyster v. Dolland*, *Scott v. Scholey*, *Metcalf v. Scholey*, *ubi supra*; *Burdon v. Kennedy*, 3 Atk. 739.

(*u*) *Doe v. Greenhill*, 4 B. & Ald. 684; *Harris v. Booker*, 4 Bing. 96; *Forth v. Duke of Norfolk*, 4 Mad. 504, *per* Sir J. Leach.

(*v*) *Hunt v. Coles*, 1 Com. 226; *Harris v. Pugh*, 4 Bing. 335.

(*w*) See 2 Sugden's *Vend. & Purch.* 386, 10th ed.; Coote on *Mortg.* 3rd ed. p. 53; 2 Powell, *Mortg.* 606.

(*x*) *Attorney-General v. Andrew*, *Hard.* 27; 2 *Inst.* 472.

ferred into trusts, had since, not indeed been abandoned, but received a much more enlarged and liberal application, and as judgments were acknowledged to be *liens* upon equitable interests, the consequence necessarily followed that a purchaser was bound by notice of a judgment, as he would be bound by notice of any other equitable incumbrance.

15. We now proceed to an examination of the more recent statutes.

1 & 2 Vict. c.
110.

By the Act for extending the remedies of creditors (1 & 2 Vict. c. 110) it is enacted—(i.) By sect. 11, That execution at law may be under an *elegit* of the whole lands freehold and copyhold, of which the debtor was seised or possessed at law or in equity, or over which he had a disposing power (y), at or subsequently to the entering up of the judgment. (ii.) By section 13, That in equity a judgment shall operate as a charge [*804] upon the whole of the lands * freehold and copyhold of which the debtor was seised or possessed at law or in equity, or over which he had a disposing power, at or subsequently to the entering up of the judgment, with a proviso that the creditor shall not be entitled to proceed in equity to obtain the benefit of such charge until after the expiration of a year from the date of the judgment, and that the protection in equity of purchasers for valuable consideration without notice shall not be disturbed. (iii.) By sect. 18, That decrees and orders of Courts of Equity, rules of Courts of Common Law, &c., whereby any sum of money, or any costs, charges or expenses, shall be payable to any person, shall have the effect of judgments (z). But (iv.) By sect. 19, That no judgments, decrees, or orders, shall affect real estate by virtue of the Act, unless and until they have been registered with the senior master of the Court of Common Pleas.

Remarks on
the Statute.

16. It is observable upon these clauses, that an equitable estate, whether of freehold or copyhold tenure,

(y) A trust for the separate use of a married woman is not an estate over which she has a disposing power within the meaning of the Act; *Digby v. Irvine*, 6 Ir. Eq. Rep. 149. Neither is the power of the settlor to defeat a voluntary settlement by means of the 27 Eliz. c. 4, a disposing power within the Act of Vict.; *Beavan v. Earl of Oxford*, 6 De G. M. & G., 507.

(z) A decree for an account merely is not within the section; *Chadwick v. Holt*, 2 Jur. N. S. 918; [*Widgery v. Tepper*, 6 Ch. D. 364.] Neither is a rule of a Court of Common Law which does not specify the sum to be paid; *Jones v. Williams*, 11 Ad. & Ell. 175; *Doe v. Amey*, 8 M. & W. 565; though, as respects costs, the case is different; *Jones v. Williams*, 8 M. & W. 349; *Doe v. Barrell*, 10 Q. B. 531.

and whether of freehold or leasehold interest, and without any restriction *to the time of execution sued*, as in the 10th section of the Statute of Frauds, is subjected by the Act to execution at *law* by writ of *elegit* (s. 11), and to *quasi* execution in *equity* by way of charge (s. 13). In the latter case purchasers without notice are expressly protected (s. 13), but in the former case not: a purchaser, therefore, even of an equitable interest, after the commencement of the Act, was obliged by this statute to search the registry at the Common Pleas for judgments entered up against the vendor, and that whether before or subsequently to the Act, for the time for entering up the judgments was immaterial, provided they had been registered. It may be thought anomalous and inconsistent that a purchaser should not be protected at *law* by want of notice, while he was in *equity*; but the intention of the legislature probably was, in giving a remedy both at law and in equity, not to disturb the principles upon which the respective Courts acted, and therefore if the trust was a *plain* one, and so amenable to a legal *elegit*, the judgment creditor might take the lands in execution even against a purchaser without notice; but if the trust was so complicated as to oblige him to apply to a Court of equity, and treat the judgment as a charge, the Court by the Act was not to disregard its established * rules, [* 805] but, as in all other cases, was to protect a purchaser without notice.

17. The following cases have been decided upon this Act. A. was entitled to an *annuity* secured by a covenant and an assignment of leaseholds in *trust to sell*, and it was held that A.'s interest under the deed might, under the Act, be made available for payment of a judgment debt due from her (a). A testator gave real estate to trustees upon trust to levy and raise, during the life of A., an *annuity* of 400*l.*, and directed the annuity to be held upon trust for the support, clothing, and maintenance of A., and the Court, having previously decided that the trust was one for the benefit of A. generally (b), held that a judgment creditor of A. was entitled to a charge on the annuity under the Act (c). A person covenanted to pay A. 5000*l.*, and that the sum should be a *charge* on certain land, and it was held that a judgment creditor of A. was entitled to a charge on the land in respect of A.'s interest there-

(a) *Harris v. Davison*, 15 Sim. 128.

(b) *Youngehusband v. Gisborne*, 1 Coll. 400.

(c) S. C. 1 De G. & Sm. 209.

in (d). A mortgage was executed with a power of sale, and the surplus made payable to the mortgagor, his heirs, appointees, or assigns, and before a sale judgment was entered up against the mortgagor, who was subsequently discharged under the Insolvent Act, and after such discharge the mortgagee sold under the power of sale, and it was held that the judgment creditor was entitled to the *surplus proceeds* of sale (e). A was tenant for life of one-third of a trust fund, which at the time was invested on *real* securities, and, it was held, though the trustees had a power of varying the securities, that A.'s interest was bound by the judgment (f). A *feme*, trustee for sale with a power of signing receipts, married, and then with the concurrence of her husband contracted to sell, and the purchaser objected that, as the *feme covert* was *beneficially entitled to one-third* of the produce, and the judgments were entered up, but after the contract, against the husband, the wife could not make a title; however, the Court held that the judgments could not neutralise or prejudice the power of sale and signing receipts (g). Where a testator devised an estate to his wife for life, with remainder upon trust to sell and *divide the proceeds* amongst the testator's sons for life, of whom James was one, it was held by V. C. Kindersley that [* 806] "the share of James was not 'any estate or interest in land' within the meaning of the statute (h). But it is observable, that of the several previous decisions one only (*Harris v. Davison*) appears to have been brought to the attention of the Court.

Proviso
against suing
in equity
until a year
after judg-
ment.

18. The object of the proviso in *sect. 13, restraining the creditor from suing for a year*, is not obvious; but most probably the framers of the Act considered, that since he would obtain, as incident to his charge, a right to a sale in equity, while under the *elegit* he could only hold the land and take the rents and profits, some delay might reasonably be interposed before the exercise of the larger statutory remedy. At all events it is settled, notwithstanding some conflict of opinion, that the

(d) *Russell v. M'Culloch*, 1 K. & J. 313; and see *Clare v. Wood*, 4 Hare, 81. But by 18 & 19 Vict. c. 15, s. 11, when the mortgagee is paid off, the judgment against him ceases to bind the land.

(e) *Robinson v. Hedger*, 13 Jur. 846; 14 Jur. 784; 17 Sim. 183; and see *Thornton v. Finch*, 4 Giff. 515.

(f) *Avison v. Holmes*, 1 J. & H. 530.

(g) *Drummond v. Tracy*, Johns. 608.

(h) *Thomas v. Cross*, 2 Dr. & Sm. 423.

proper remedy is by proceeding *in equity for a sale* (i). And, notwithstanding the proviso, it has been held that the judgment creditor is entitled to have the interest of his debtor at once *secured* for the creditor's protection (k); and as between *two judgment creditors* the one who first obtains the charging order has priority (l).

19. The 14th section of the Act, which introduces a species of execution against *stock and shares in public funds and public companies*, which before were not liable, deserves a separate consideration. By that section it is enacted that if any person against whom any judgment (m) shall have been entered up in any of Her Majesty's superior Courts at Westminster, shall have any Government stock, funds, or annuities, or any stock or shares of or in any company in England, standing in his name in his own right (n), or *in the name of any person in trust for him*, it shall be lawful for the Judge of one of the superior Courts, on the application of any judgment creditor, to order, that such *stock, &c.*, shall stand charged with the payment of the amount for which judgment may have been recovered, and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charges had been made in his favour by the judgment debtor, provided that no proceedings shall be taken to have the benefit of such charge until after the expiration of *six calendar months* from the date of such order; and by the next following section of the Act it is provided that the order of the Judge shall be *ex parte* in the first instance, and, on notice to the Bank or Company, shall operate as a *dis-*

Consideration of the Charging Order provisions.

(i) *Carlton v. Farlar*, 8 Beav. 525; *Footner v. Sturgis*, 5 De G. & Sm. 736; *Smith v. Hurst*, 1 Coll. 705; 10 Hare, 30; *Tuckley v. Thompson*, 1 J. & H. 126, 130; but *Jones v. Bailey*, 17 Beav. 582, is *contra*.

(k) *Yescombe v. Landor*, 28 Beav. 80; *Partridge v. Foster*, 34 Beav. 1; *Tillett v. Pearson*, 43 L. J. N. S. Ch. 93. And see *Smith v. Hurst*, 1 Coll. 705, and S. C. 10 Hare, 43; *Mackinnon v. Stewart*, 1 Sim. N. S. 76, 91.

(l) *Thomas v. Cross*, 2 Dr. & Sm. 423.

(m) Extended to *Decrees, &c.*, by sect. 18, and by 3 & 4 Vict. c. 82, s. 1, the property intended to be embraced by this section is further defined, so as to include any interest (as a life estate) in stock or shares.

(n) Where shares in a company had been transferred by a father without consideration into the name of his son in order to qualify the son to be a director of the company, to be re-transferred to the father upon request, it was held that the shares were not standing in the son's name in his own right within the meaning of the Act; *Re Blakely Ordnance Company*, *Frederick Coate's case*, 46 L. J. N. S. Ch. 367. But see *Jeffryes v. Reynolds*, 52 L. J. N. S. C. L. 55; 48 L. T. N. S. 358.]

tringas, and that no disposition of the judgment debtor in the meantime shall be valid as against the judgment creditor, [and that unless the judgment debtor shall within a time to be mentioned in the order show cause, the order shall be made absolute, but the Judge may upon the application of the judgment debtor or any person interested discharge or vary the order.]

20. The leading points decided with reference to this new species of execution are the following :—

By whom
charging
order should
be made.

a. [Under the old practice it was held that] in the ordinary case of a *judgment at law*, the application for the charging order must be made to one of the *Common Law Judges*, even though the stock to be charged were standing in the name of the Paymaster-General (o). But where a charging order was to be made in furtherance of a *decree of the Court of Chancery*, it could properly be made by a *Judge of the Court of Chancery* (p). [But now the charging order may be made by any Divisional Court or by any Judge (q).] The charging order is made *ex parte* and *nisi* in the first instance, but when confirmed absolute it operates from the order *nisi* (r).

Charging
order will be
made at law
without
deciding the
quantum of
interest
charged.

β. Where stocks or funds are *vested in trustees*, and a judgment debtor appears to be interested therein, the charging order will be made at law, so as to affect the *interest of the judgment debtor*, whatever it may be, leaving it to the trustees, if the precise amount of the debtor's interest is not sufficiently defined, to say they will not act except under the direction of the Court (s). [But a charging order cannot be made affecting stocks and shares forming part of a residuary estate in which the debtor is interested, but which are meanwhile subject to a direction for conversion (t).]

Bank or
public com-
pany bound
to pay to
trustee, not-
withstanding
charging
order on
interest of
cestui que
trust.

[* 808] * γ. Where a charging order is made upon the partial interest of a *cestui que trust in stock or shares* standing in the names of trustees, the Bank or public company whose stock or shares are affected by the charging order, is not concerned with questions arising

(o) *Hulkes v. Day*, 10 Sim. 41.

(p) *Stanley v. Bond*, 7 Beav. 386; *Westby v. Westby*, 5 De G. & Sm. 516; *Wells v. Gibbs*, 22 Beav. 204.

[(q) See Order 47, R. 1 of the Rules of the Supreme Court.]

(r) *Haly v. Barry*, 3 L. R. Ch. App. 452; [*Burns v. Irving*, 3 Ch. D. 291; and see *Widgery v. Tepper*, 6 Ch. D. 364]

(s) *Fowler v. Churchill*, 11 M. & W. 57; *Rogers v. Holloway*, 5 M. & Gr. 292; *Cragg v. Taylor*, 12 Jur. N. S. 320; 1 L. R. Ex. 148; 2 L. R. Ex. 131; [*South Western Loan Company v. Robertson*, 8 Q. B. D. 17.]

[(t) *Dixon v. Wrench*, 4 L. R. Ex. 154.]

between the judgment creditor and other persons interested in the trust fund, but is bound, in like manner as before the charging order, to pay the dividends to the trustees (v).

[δ. A charging order may be made in respect of a judgment made payable on a future day (w).]

[Judgment payable in futuro.]

ε. The proviso at the end of the 14th section, forbidding proceedings until *after six calendar months*, applies only to proceedings for enforcing *immediate payment* of the debt by realising the security, and does not prevent the judgment creditor from taking steps to prevent the security given him by the statute from being in the meantime defeated or diminished. Thus, where the funds are standing in the name of the Paymaster-General, the judgment creditor may, *within the six months*, apply for a stop order to restrain the debtor from receiving dividends accruing within the six months (x).

Proviso at the end of sect. 14 does not forbid suit for protecting interest of judgment creditor.

ς. It must be considered as now settled, notwithstanding a decision of the Court of Queen's Bench to the contrary (y), that a judgment creditor who obtains a charging order against stock vested in a trustee is entitled to such interest therein only, as the debtor has, and must take subject to all *specific charges*, whether notice thereof may or not have been given to the trustee before he has notice of the charging order (z).

As to effect of charging order in reference of other incumbrances.

η. And a charging order has no greater effect than an instrument of charge executed by the judgment debtor would have had, so that, if the debts on which the judgment and charging order were founded was void, the charging order is inoperative (a)

(v) *Churchill v. Bank of England*, 11 M. & W. 323; [*South Western Loan Company v. Robertson*, 8 Q. B. D. 17.]

[(w) *Younghusband v. Gisborne*, 1 De G. & Sm. 209; *Bagnall v. Carltan*, 6 Ch. D. 130.]

(x) *Watts v. Jefferyes*, 3 Mac. & G. 372; and see *Bristed v. Wilkins*, 3 Hare, 235. [Under the new practice it is not necessary as a preliminary to obtaining a stop order on a fund in Court to the credit of the Chancery Division by a person who has a judgment in an action in another Division that he should obtain a charging order in that Division; *Hopewell v. Barnes*, 1 Ch. D. 630; *Shaw v. Hudson*, 48 L. J. N. S. Ch. 689.]

(y) *Watts v. Porter*, 3 Ell. & Bl. 743; *Erle J., diss.*

(z) *Beavan v. Earl of Oxford*, 6 De G. M. & G. 507; *Kinderley v. Jervis*, 22 Beav. 34; *Scott v. Hastings*, 4 K. & J. 633; [*Punchard v. Tomkins*, 31 W. R. 286, in which case a prior unregistered specific charge of lands in Middlesex, was held to have priority over a subsequent general and roving charge.]

(a) *Re Onslow's Trusts*, 20 L. R. Eq. 677. It has been held under the Irish Act that a conditional charging order made *Ex parte* can be served on a person out of the jurisdiction; *Re Gethin*,

[Remedies
under charging
order.]

[* 809] [(*θ*.) The judgment creditor is entitled to the same remedies under the charging order, as he would have had if the charge had been created by contract between himself and the debtor; and must therefore, to enforce the charge, institute fresh proceedings for foreclosure or sale, without which the Court has no jurisdiction to order a sale of the shares (*b*).]

[Order
absolute cannot
be discharged.]

(*ι*) After the order has been made absolute, it cannot be discharged, even upon the application of a person who shows that the shares were standing in the name of the judgment debtor as a mere trustee for the applicant (*c*).]

2 & 3 Vict. c.
11.

21. The 1 & 2 Vict. c. 110, was soon followed by another statute (2 & 3 Vict. c. 11), by which it was enacted:—(*I*.) By section 2, that no *judgment* whatsoever should affect any lands, tenements, or hereditaments as to purchasers, mortgagees, or creditors, unless previously *registered* at the Common Pleas according to the provisions of the Act 1 & 2 Vict. c. 110. (*II*.) By section 4, that all *judgments, decrees, rules, and orders* registered, or to be registered, at the Common Pleas, according to the provisions of the Act 1 & 2 Vict. c. 110, should, at the expiration of *five years*, be null and void against lands, tenements, and hereditaments, as to *purchasers, mortgagees, or creditors* (*d*), unless they should have again been registered in the Common Pleas within five years before the right, title, estate, or interest of such purchasers, mortgagees, or creditors accrued (*e*). (*III*.) By section 5, that as against purchasers and mortgagees *without notice*, no *judgment, decree, or order*

9 I. R. Eq. 512. [And see *Re Blakely Ordnance Company, Frederick Coates's Case*, 46 L. J. N. S. Ch. 367.]

[(*b*) *Leggott v. Western*, 12 Q. B. D. 287.]

[(*c*) *Jeffries v. Reynolds*, 52 L. J. N. S. C. L. 55; 48 L. T. N. S. 358.]

(*d*) These words mean *purchasers, mortgagees, or creditors* becoming such after the omission to re-register, so that, if A. and B. be respectively first and second judgment creditors who both duly register, A. does not, by subsequently omitting to re-register, lose his priority over B.; *Beavan v. Earl of Oxford*, 6 De G. M. & G. 492; *Shaw v. Neale*, 6 H. L. Cas. 581; and see *Simpson v. Morley*, 2 K. & J. 71; *Benham v. Keane*, 1 J. & H. 697. So where A., B. and C. were successive judgment creditors, and A. registered his judgment on the 12th of March, 1840, but never re-registered; B. registered his judgment in April, 1842, and re-registered in March, 1848; C. registered his judgment on the 18th of March, 1845, and re-registered on the 16th of March, 1850, it was held that C. was first entitled to take the amount due on A.'s judgment, and then that B. was entitled to be paid the full amount of his judgment before C. took anything more in respect of his judgment; *Re Lord Kensington*, 29 Ch. D. 527.

(*e*) And see 18 & 19 Vict. c. 15, s. 6.

should have a greater effect than a judgment would have had against such purchaser or mortgagee before the passing of 1 & 2 Vict. c. 110. (iv.) By section 8, that judgments, statutes, and recognizances to the *Crown* should not bind purchasers or mortgagees unless registered as Crown debts at the Common Pleas (*f*). By virtue of the * above clauses the execution [* 810] that might under the former statute have been taken out at law against an equitable interest in the hands of a *purchaser for value without notice* was, in common with every other advantage given by the former statute against such purchaser, recalled, and the purchaser was relieved from the necessity of carrying his search back beyond the period of five years; except as regarded Crown debts, to which the enactment requiring re-registration did not apply.

A singular result of the 5th section was, that in the occasional, though rarely occurring case of a purchase or mortgage *without notice* of a previously registered judgment, the old law, as it existed before 1 & 2 Vict. c. 110, was resorted to for guidance. Thus, by 1 & 2 Vict. c. 110, judgments were a lien upon leaseholds, but by 2 & 3 Vict. c. 11, s. 5, if a purchaser or mortgagee had no notice of a registered judgment (for registration is not notice *per se*), he was not bound by the judgment unless at the time of the purchase or mortgage an elegit had been issued, for by the old law a judgment became a lien only upon chattels upon the writ of execution being lodged in the hands of the sheriff (*g*).

Old law still applicable in case of purchase for value *without notice*.

22. This Act, however, still left open the question whether, by analogy to the cases under the Registry Acts, a purchaser, mortgagee, or creditor, if he had actual notice of an unregistered judgment, was not bound by it; and a subsequent Act, 3 & 4 Vict. c. 82, was passed to obviate this. It was thereby enacted, by the second section, that no *judgment, decree, order or rule* (not mentioning Crown debts) should, *by virtue of the said Act* (1 & 2 Vict. c. 110), affect any lands at law or in equity as to purchasers, mortgagees, or creditors, until registration (*h*) under the said Act at the Common

(*f*) The Act speaks only of recognizances to the *Crown*, and not of recognizances in general, as on receiverships, which are also liens on real property. The 27 & 28 Vict. c. 112, s. 1, extends to recognizances *generally*; but the Act is not retrospective, and therefore does not apply to recognizances entered up before the passing of the Act 29th July, 1864. Recognizances to the Crown are further provided for by 28 & 29 Vict. c. 104, s. 48.

(*g*) *Westbrook v. Blythe*, 3 Ell. & Bl. 737.

(*h*) The framer of this Act appears to have overlooked the in-

Pleas, any notice of such judgment, decree, order, or rule to any purchaser, mortgagee, or creditor, in any-wise notwithstanding.

18 & 19 Vict.
c. 15.

23. It being, however, doubted whether this Act protected a purchaser, mortgagee, or creditor from the effect of notice as to any remedy against him which the judgment creditor had before, independently of 1 & 2 Vict. c. 110, or whether its effect was not limited to protection against the additional remedy given to the judgment creditor by that Act (*i*), it was, in order to [*811] obviate this * inconvenience, enacted generally, by 18 & 19 Vict. c. 15, s. 4, that no *judgment, decree, or rule* (*k*), which might be registered under 1 & 2 Vict. c. 110, should affect any lands, &c., at law or in equity, as to purchasers, mortgagees, or creditors, unless and until the memorandum, &c., should have been left with the proper officer, any notice of any such judgment, decree, &c., to any such purchaser, mortgagee, or creditor, in anywise notwithstanding.

22 & 23 Vict.
c. 35.

24. The 22 & 23 Vict. c. 35, s. 22, puts *Crown debts* on the same footing as judgments as regards the necessity of re-registration from time to time, thus reducing the period over which the search for Crown debts should extend to five years, as in the case of judgments, &c.

23 & 24 Vict.
s. 38.

25. By the Law of Property Amendment Act, 23 & 24 Vict. c. 38, s. 1, freehold, copyhold and leasehold estates, were, in respect of *judgments* (*l*), *statutes and recognizances*, as against purchasers and mortgagees, placed upon the same footing, and no such judgments, &c., entered up after the date of the Act (*23rd July, 1860*), were to affect lands in the hands of purchasers or mortgagees, unless *a writ of execution should have been issued and registered* before the conveyance or mortgage, and unless execution should be put in force within three calendar months from the registration. A purchaser, therefore, was thus precluded from objecting to the title on the ground of his having notice of a judgment entered up after the Act, and registered at

intermediate Act of 2 & 3 Vict. c. 11, and to have left it doubtful whether re-registration within five years was necessary to exclude the title of a purchaser with notice. This doubt is now set at rest by sect. 5 of 18 & 19 Vict. c. 15.

(*i*) See *Beere v. Head*, 3 Jon. & Lat. 340.

(*k*) N.B. Not mentioning Crown debts.

(*l*) This, by sect. 5, includes decrees, orders in equity and bankruptcy, and other orders having the operation of a judgment.

the Common Pleas, but upon which no execution had been issued (*m*).

26. As to the meaning of the word *purchasers*, it has been held that a wife and children are purchasers under a marriage settlement of the interests limited to them out of the husband's estate, but the husband as to a life interest limited to himself out of his own estate is not a purchaser, and a judgment therefore would attach upon it just as if it were not the subject of settlement. (*n*). Who are purchasers.

27. And the construction of the Acts extending the remedies of the judgment creditor, is that as to *equitable interests* they are to receive the same construction as the Statute of Frauds, and consequently that simple trusts only can be taken in execution at law (*o*). Construction of the Acts.

28. We now come to the more recent Act, 27 & 28 Vict. c. 112, * which enacts, by the first sec. [* 812] c 112. tion, that no *judgment, statute or recognizance* to be entered up after *29th July, 1864*, shall affect any land until *actual delivery of the land in execution by a writ of elegit or other lawful authority* (*p*). And by the third section, that every writ or other process of execution must be *registered* in the name of the *debtor*. And by the fourth section, that the creditor to whom any land shall have been actually delivered in execution (*q*), is entitled forthwith to obtain from the Court of Chancery, upon petition, an order to be served upon the debtor only for the *sale of the debtor's interest* in the land; and thereupon enquiries are to be directed as to the nature and particulars of such debtor's interest (*r*). And by the fifth section, that if it be found that the land is charged with *any other debt* due on any judgment, statute, or recognizance, whether prior or subsequent to the charge of the petitioner, such other creditor is to be served with notice of the order for sale, and is to be at liberty to attend the proceedings; and the proceeds of sale are then to be distributed amongst the parties entitled according to their priorities. It is to be

(*m*) *Wallis v. Morris*, 10 Jur. 740; and see *Thomas v. Cross*, 2 Dr. & Sm. 423.

(*n*) *Re Browne*, 13 Ir. Ch. Rep. 283.

(*o*) *Digby v. Irvine*, 6 Ir. Eq. Rep. 149.

(*p*) The provisions of this Act are by 28 & 29 Vict. c. 104, s. 48, extended, as from 1st November, 1865, to Crown debts.

(*q*) As to the effect of these words, see *Re Cowbridge Railway Company*, 5 L. R. Eq. 413.

(*r*) As to the inquiries which the Court directs, see *Re Ventnor Harbour Company*, W. N. 1866, p. 9; *Re Hull and Hornsea Railway Company*, 2 L. R. Eq. 262; *Gardner v. London Chatham and Dover Railway Company*, 2 L. R. Ch. App. 385.

noticed also that judgments are made by the second section to comprise "registered decrees, orders of the Courts of equity and bankruptcy, and other orders having the operation of a judgment."

The Act as affecting equitable interests.

29. This Act has a most important bearing upon equitable interests. The object of it, as expressed in the preamble, was "to assimilate the law affecting freehold, leasehold, and copyhold estates to that affecting pure personal estates," and it extends to land "or *any interests therein*," and therefore comprises all equitable interests. For the future, therefore, judgments are not to affect any equitable interest "until actual delivery of the land in execution by a writ of *elegit* or other lawful authority." But the words "actual delivery" are to be construed in a liberal sense, for incorporeal hereditaments and equities are not capable of manual delivery, and yet are included in the Act. Indeed as Lord Justice Mellish observed, "The sheriff (as to a *legal elegit*) does not give the creditor *actual possession* of the land itself, but the effect of his return is to vest the legal estate in the creditor, who can then bring an ejectment" (s). The Act speaks of delivery of possession, [*813] not only by writ of *elegit*, but "by *other lawful authority*," and this has been held to mean, "any lawful authority which could cause such a delivery in execution as the subject matter is capable of, and where a judgment creditor comes into equity to remove a legal impediment, the relief given is substantially a delivery in possession whether in form it be a *writ of assistance* or of *sequestration*, or the *appointment of a receiver*" (t).

Present state of the law.

A judgment creditor therefore who comes under the operation of the Act may still institute proceedings for equitable execution against an equitable interest, but the judgment forms no *lien* upon the equitable interest until the creditor has reached some process in equity corresponding to actual execution at law, such as sequestration, or the appointment of a receiver, or an order for sale. Thus a creditor having a judgment against a mortgagor may bring an action against him for equitable execution by the appointment of a receiver, subject to the right of the mortgagee (u), or he may take proceedings against the mortgagor and mort-

(s) *Hatton v. Haywood*, 9 L. R. Ch. App. 236.

(t) *Hatton v. Haywood*, 9 L. R. Ch. App. 235, *per* Lord Selborne; [*Anglo-Italian Bank v. Davies*, 9 Ch. D. 275; *Ex parte Evans*, 11 Ch. D. 691; 13 Ch. D. 252;] and see *Re Bailey's Trust*, 38 L. J. N. S. Ch. 237.

(u) *Wells v. Kilpin*, 18 L. R. Eq. 298; [*Kidd v. Tallentire*, W. N. 1877, p. 21; *Anglo-Italian Bank v. Davies*, 9 Ch. D. 275.]

gagee for redemption of the mortgage and foreclosure of the mortgagor (*v*). [So a judgment creditor may obtain the appointment of a receiver of a reversionary interest in a trust estate (*w*), or of a life interest in settled funds (*x*), or of a debt or sum of money payable to the judgment debtor to which garnishee proceedings are not applicable (*y*), and the appointment of a receiver may be made *ex parte* upon an interlocutory application immediately after the institution of the action (*z*), or without the institution of a fresh action on an interlocutory application in the action in which the judgment was obtained (*a*); and the appointment though made conditional upon the receiver's giving security operates as an *immediate* equitable execution (*b*); and if the property is already in the hands of a receiver, the Court may appoint another receiver but not to act until the earlier receiver has been discharged, which would amount to equitable execution (*c*); and if the appointment of the receiver is merely for the purpose of giving a charge * and it is not intended that the [* 814] receiver should go into possession, the Court will make the appointment without security, on the judgment creditor and the receiver undertaking that the receiver shall not act without the leave of the Court (*d*)]. But should a judgment creditor without taking proceedings for equitable execution present a *petition in a summary way under the Act for sale of the equitable interest*, the petition would be dismissed, as the creditor has no *lien* by virtue of the *judgment itself*, and the Court has not yet awarded any *equitable execution* (*e*); and so, if a creditor having a judgment against a mortgagor bring an action for execution against the equity of redemption, and, *before the Court has made any order amounting to equitable execution*, the mortgagor becomes bankrupt, the action must be dismissed, for no *lien* had attached previously to the bankruptcy which vested the

(*v*) *Beckett v. Buckley*, 17 L. R. Eq. 435.

(*w*) *Fuggle v. Bland*, 11 Q. B. D. 711.]

(*x*) *Oliver v. Lowther*, 42 L. T. N. S. 47; 28 W. R. 381.]

(*y*) *Westhead v. Riley*, 25 C. H. D. 413.]

(*z*) *Anglo-Italian Bank v. Davies*, 9 Ch. D. 275; *Ex parte Evans*, 11 Ch. D. 691; 13 Ch. D. 252.]

(*a*) *Smith v. Cowell*, 6 Q. B. D. 75; *Fuggle v. Bland*, 11 Q. B. D. 711; *Salt v. Cooper*, 16 Ch. D. 544.]

(*b*) *Ex parte Evans, ubi supra.*

(*c*) *Per Jessel M. R. Salt v. Cooper*, 16 Ch. D. 544.]

(*d*) *Hewett v. Murray*, W. N. 1885, p. 53.]

(*e*) *Re Duke of Newcastle*, 5 L. R. Eq. 700; and see *Re Cowbridge Railway Company*, 5 L. R. Eq. 413; *Re South*, 9 L. R. Ch. App. 369.

property in the trustees for the benefit of all the creditors equally (*f*).

Property not capable of actual delivery.

Where the subject matter is *not in possession*, and therefore is in its nature not capable of *actual delivery* by the sheriff, as in the case of a remainder expectant on a particular estate, there, although the sheriff may have made a *return of actual delivery*, yet, as such return is false in law and therefore null, a *petition* for sale under the Act founded upon such return cannot be sustained (*g*).

Whether an *elegit* must be actually sued out.

30. The mode of proceeding in equity appears to be this: if the creditor seek to remove some impediment to the *legal* execution of the judgment, he must lay a foundation for the interference of equity [by shewing that the legal remedies have been exhausted. For this purpose it was, prior to the Judicature Act, necessary for the creditor to sue] out an *elegit* at law (*h*); and the same rule prevailed where the judgment was merely an *equitable lien* (*i*); but the *elegit* need not have been returned (*k*); and where the trust estates were in three counties an *elegit* in one was held to be sufficient (*l*). [But since the Judicature Act it is not necessary to sue out an *elegit* if it can be otherwise shown that there is [* 815] no *property of the debtor against which the *elegit* could be issued for the purpose of satisfying the judgment, and where an affidavit to that effect was made by the creditor, a receiver was appointed although no *elegit* had issued (*m*); and a judgment creditor may in the same action establish a charge and enforce it (*n*).]

Fi. fa. sufficient in case of equitable chattel real.

When the interest sought to be affected is an *equitable chattel real*, it is sufficient to sue out a writ of *fieri facias* (*o*). And when the assistance of the Court is sought in favour of a County Court judgment against

(*f*) *Hatton v. Haywood*, 9 L. R. Ch. App. 229.

(*g*) *Re South*, 9 L. R. Ch. App. 369.

(*h*) See *Dillon v. Plasket*, 2 Bligh, N. S. 239; *Neate v. Duke of Marlborough*, 3 M. & Cr. 407; *Mitford on Plead.* 126, 4th edit.

(*i*) *Neate v. Duke of Marlborough*, 9 Sm. 60; 3 M. & Cr. 407; *Godfrey v. Tucker*, 33 Beav. 280; *Imperial Mercantile Credit Association v. Newry and Armagh Railway Company*, 2 Ir. Rep. Eq. 23, *per Cur.*; but see *Tunstall v. Trappes*, 3 Sim. 286; *Rolleston v. Morton*, 1 Conn. & Laws. 257.

(*k*) *Dillon v. Plasket*, 2 Bligh, N. S. 239; and see *Campbell v. Ferrall*, Rep. t. Plunket, 388; [*Anglo-Italian Bank v. Davies*, 9 Ch. D. 275.]

(*l*) *Dillon v. Plasket*, 2 Bligh, N. S. 239.

(*m*) *Ex parte Evans*, 11 Ch. D. 691; 13 Ch. D. 252; *Anglo-Italian Bank v. Davies*, 9 Ch. D. 275.]

(*n*) *Beckett v. Buckley*, 17 L. R. Eq. 435.]

(*o*) *Gore v. Bowser*, 3 Sm. & G. 1; *Smith v. Hurst*, 10 Hare, 30; *Smith v. Hurst*, 1 Coll. 705; *Partridge v. Foster*, 34 Beav. 1.

an equitable chattel real, it is sufficient to pursue the analogous step of placing a writ of execution in the hands of the high bailiff, pursuant to the County Court Act (*p*).

A judgment creditor may *redeem a mortgage* without suing out an *elegit*; for inasmuch as the Court finds the creditor in a condition to acquire a power over the estate by suing out the writ, it gives to the party the right to come in and redeem other incumbrancers upon the property (*q*).

Redemption of a mortgage.

Whether the judgment be *legal* or *equitable*, if the creditor take proceedings in equity *after the death of the conusor* for satisfaction of his claim out of the personal assets, and in case of their deficiency, by a sale of the real estate, an actual *elegit* is *not* an essential requisite (*r*).

Proceedings in equity of judgment creditor after death of conusor.

[31. In order to found an attachment under Order 45 of the Rules of the Supreme Court, there must be an actual debt at the time, although it need not be then due. Therefore, where a judgment debtor was entitled for life to the income of a trust fund payable half-yearly, and the trustees had duly made the last half-yearly payment and had no money representing income in their hands it was held that there was nothing to attach. The proper course in such a case is to obtain equitable execution by the appointment of a receiver (*s*).]

[Attachment under Order 45.]

32. A creditor who has issued execution against the goods or lands of a debtor, or has attached any debt due to him, is not entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution * or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor. And an execution against goods is completed by seizure and sale; an attachment of a debt by receipt of the debt; and an execution against land by seizure, or, in the case of an equitable interest, by the appointment of a receiver (*t*).]

[Effect of bankruptcy.]

(*p*) *Bennett v. Powell*, 3 Drew. 326.

(*q*) *Neate v. Duke of Marlborough*, 3 M. & Cr. 416, *per* Lord Cottenham; and see *Godfrey v. Tucker*, 33 Beav. 284.

(*r*) *Barnewall v. Barnewall*, 3 Ridg. P. C. 24. See the observations of Lord Fitzgibbon, p. 61; *Neate v. Duke of Marlborough*, 3 M. & Cr. 416.

(*s*) *Webb v. Stenton*, 11 Q. B. D. 518; see *Re Cowan's Estate*, 14 Ch. D. 638].

(*t*) 46 & 47 Vict. c. 52, s. 45.]

Case of lands lying in a register county. 33. The law as to priority of judgments in the case of lands lying in a *register county* is as to judgments entered up on or before 29th July, 1864 (the date of the last Act), by the combined effect of the County Register Acts and of the Acts of the Queen before referred to, in a singular position.

Judgment postponed to subsequent purchase or mortgage without notice, unless registered both in County Register and at the Common Pleas. Rights of two judgment creditors *inter se*. It is clearly settled that the County Register Acts are still in force, and consequently that, in order to give a *locus standi* to a judgment creditor over a subsequent purchaser or mortgagee *without notice*, his judgment must be registered both in the County Register and in the Common Pleas, before the completion of the purchase or mortgage (*u*).

34. But the doctrine of notice does not apply as between two *judgment creditors*; and therefore a judgment creditor who, by first registering in Middlesex, has gained priority at law over a judgment of previous date duly registered in the Common Pleas, but not in Middlesex, will not be postponed in equity because he had at the time of so registering notice of the prior judgment (*v*). And, therefore, generally, as between two judgment creditors, the one who first registers in the County Register obtains precedence over one who registers afterwards in the County Register, though he may not have registered first at the Common Pleas (*w*).

Case where subsequent purchaser or mortgagee has notice. 35. Where the subsequent purchaser or mortgagee has notice of a prior judgment, the question is, whether the judgment was registered at the Common Pleas before the completion of the purchase or mortgage, since, as we have before seen, unless so registered it cannot bind, *notwithstanding the notice*. But if duly registered in the Common Pleas, then notice to the purchaser or mortgagee will, *in equity*, though not in law, supply the want of registration in the county (*x*).

27 & 28 Vict. c. 112. [*817] *36. As to judgments entered up since 27 & 28 Vict. c. 112 (29th July, 1864), there must now be not only registration at the Common Pleas, in addition to the County Registry, but also *actual delivery of the land in execution* under the writ (*y*).

(*u*) Westbrook v. Blythe, 3 Ell. & Bl. 737.

(*v*) Benham v. Keane, 1 J. & H. 685; and on appeal, 3 De G. F. & J. 318.

(*w*) Hughes v. Lumley, 4 Ell. & Bl. 274; Neve v. Flood, 33 Beav. 666.

(*x*) Benham v. Keane, 1 J. & H. 685; Tunstall v. Trappes, 3 Sim. 302; Davis v. Earl of Strathmore, 16 Ves. 427.

(*y*) See *Re Bailey's Trusts*, 38 L. J. N. S. Ch. 237.

SECTION VIII.

OF EXTENTS FROM THE CROWN.

1. The equitable interest of a term, or of a freehold Extent binds held in trust, is liable to an extent from the Crown (z); trust. and this not by the effect of any legislative enactment, but *per cursum scaccarii* at common law (a). The words of the writ issued to the sheriff are to hold inquest of the lands whereof the debtor, not *seisitus fuit*, but *habuit vel seisitus fuit*, and a person may be said to have lands, when by subpoena in Chancery he may exercise any dominion over them (b).

2. At common law the extent of the Crown did not authorize a sale of the lands; but only the perception Sale of the lands extended. of the rents and profits, until the amount of the debt was levied (c). This defect was supplied partially by a statute of Elizabeth (d), and more effectually by 25 G. 3, c. 35. It is by the latter statute enacted, that "it shall be lawful for the Court of Exchequer, and the same Court is thereby authorized, on the application of the Attorney-General (e), in a summary way by motion (f) to the same Court, to order that the right, title, estate, and interest of any debtor to the Crown, and the right, title, estate, and interest of the heirs and assigns of such debtor, which have been or shall be extended under or by virtue of any extent or *diem clausit extremum*, shall be sold as the Court shall direct, and the conveyance shall be made by the Remembrancer in the said Court of Exchequer or his deputy, under the direction of the said Court, by a deed of bargain and sale to be inrolled in the said Court."

* 3. By the effect of this enactment, a trust [*818] Equity of redemption. or equity of redemption (g) of a Crown debtor may now be sold upon summary application to the Queen's Bench Division by motion.

(z) King v. Lambe, M'Clel. 422, per Sir W. Alexander; Chirton's case, Dyer, 160, a; S. C. cited Sir E. Coke's case, Godb. 293; the cases cited Id. 294; Id. 298; Babington's case, cited Id. 299; King v. Smith, Sugd. Vend. & Purch. Append. No. xv. 11th edit. per Ch. Baron Macdonald.

(a) Attorney-General v. Sands, Hard. 495, per Lord Hale.

(b) See Sir E. Coke's case, Godb. 294.

(c) Rex v. Blunt, 2 Y. & J. 122, per Baron Hulloek.

(d) 13 Eliz. c. 4.

(e) See Rex v. Bulkeley, 1 Y. & J. 256.

(f) See Rex v. Blunt, 2 Y. & J. 120.

(g) King v. De la Motte, Förr. 162.

SECTION IX.

OF FORFEITURE.

Trust not
forfeitable at
common law
for attainder.

1. A TRUST of lands was never *forfeitable* at common law for attainder of either treason or felony (*h*); for forfeiture worked only upon *tenure*, and a trust was *holden* of nobody. The ground of the forfeiture at law was that all estates were *held* upon condition of duty and fidelity to the lord, and upon breach of allegiance they returned to the Crown, from whom they originally proceeded (*i*).

26 H. 8, c.
13.

2. The exemption of the *use* from forfeiture was remedied in the case of *treason*, by 26 H. 8, c. 13, s. 5, whereby it was enacted, that, "every offender convicted of high treason by *presentment*, *confession*, or *process of outlawry*, should forfeit to the King all such lands, &c., which such offender should have of any estate of inheritance in *use* or *possession*."

27 H. 8.

3. The following year was passed the 27 H. 8, by which *uses* were abolished, and, as the *trust* which grew up in the place of the use was held to be an interest *sui generis*, and not within reach of the statutes directed against uses, the legislature was again called upon to interpose by special enactment to remedy the defect.

33 H. 8, c.
20.

4. The 33 H. 8, c. 20, s. 2, declared, that "if any person or persons should be attainted of high treason by the course of the *common laws or statutes of the realm*, every such attainder by the *common law* (*k*) should be of as good strength, value, force, and effect, as if it had been done by the authority of Parliament; and that the King's Majesty, his heirs and successors, should have as much benefit and advantage by such attainder, as well of *uses, rights, entries, conditions*, as possessions, reversion^s remainders, and all other things, as if it had been done and declared by authority of Parliament, and should be deemed and adjudged in *actual and real possession* of the lands, tenements, hereditaments, uses, goods, chattels, and all other things of the offenders so [* 819] attainted, which * his highness ought lawfully

(*h*) Attorney-General v. Sands, Hard. 495, *per* Lord Hale; 1 Hale's P. C. 247; Jenk. 190.

(*i*) Gilb. on Uses, 38.

(*k*) This includes the general statutes of the realm, as opposed to a special Act attainting a particular individual.

to have, and which they, being so attainted, ought or might lawfully lose and forfeit, if the attainder had been done by authority of Parliament, *without any office or inquisition to be found of the same.*"

5. Notwithstanding this statute, it was laid down ex-
 tra-judicially in the reign of James I., and was said to King v. Dac-
 have been so resolved previously (1), that the *trust* of a combe.
 freehold was *not* forfeited upon attainder of treason;
 and it has been remarked by the highest legal author-
 ity, that this doctrine "may be thought to be founded
 on reason, because it is not pretended that the statute
 of 26 H. 8, can embrace trusts which have succeeded to
 uses, and it does not appear to have been the intention
 of the 33 H. 8, to create a forfeiture of any equitable es-
 tate which has sprung up since the former Act. The
 statute had other objects" (m).

6. To understand the scope of the enactment it must Construction
 be observed—1. That previously to 33 H. 8, it was only of 33 H. 8.
 in the case of a person attainted by Act of Parliament,
 and then by a special proviso, that the King was put in
immediate possession of the offender's lands, for in at-
 tainders by ordinary course of law, whether by common
 law or under a statute, the King was not in possession
until office found. 2. That 26 H. 8, had extended the
 forfeiture to lands in *use* or *possession*, but not to *rights*,
entries, or *conditions*; and now that 27 H. 8, had passed,
 the 26 H. 8, was not even applicable to *uses*, or, as they
 were henceforth to be called, *trusts*. 3. That 26 H. 8,
 had embraced attainders by *presentment*, *confession*,
verdict, or *process of outlawry*, but had omitted other
 cases, as where the offender stood mute. The intention
 of the legislature, then, in passing 33 H. 8, was, as re-
 solved in *Dowtie's case* (n),—1. To vest the actual pos-
 session in the King by the attainder *without office*; 2.
 To extend the forfeiture to *rights*, *entries*, *conditions*,
 &c., which had hitherto not been affected by attainder;
 and, 3. To apply the statutory provisions to all cases of
 attainder, including those which 26 H. 8, had accidentally
 omitted.

Assuming the Act to have had a remedial scope, can
 it be supposed that, when "rights, entries, and condi-
 tions" were, for the first time, made forfeitable by virtue
 of this enactment, the word "*uses*," which occupies the
 first place in the series, should have been inserted as

(1) King v. Dacombe, Cro. Jac. 512.

(m) Gilb. on Uses, by Lord St. Leonards, 78, note 9; and see
 Burgess v. Wheate, 1 Eden, 221.

(n) 3 Rep. 9, b.

mere surplusage, remembering that uses, by having been turned into possessions by 27 H. 8, had escaped [* 820] the * forfeiture imposed upon them by 26 H. 8? The insertion of the word “uses” can be no argument that “trusts” were not intended, for at that day both words were employed indifferently, as terms perfectly synonymous.

In support of this reasoning may be cited the opinions expressed by Baron Turner and Lord Hale, in the well-considered case of *Attorney-General v. Sands* (o). And Lord Hale afterwards recurs to the subject in his Pleas of the Crown (p), and argues the point there with considerable strength of reasoning:—“By the statute of 27 H. 8,” he says, “all uses were drowned in the land; but there have succeeded certain equitable interests called *trusts*, which differ not in substance from uses; nay, by that very statute they come under the same name—viz. uses or trusts. By the statute 33 H. 8, there is a special clause that the person attainted shall forfeit all ‘uses’; and what other uses there could be at the making of the statute 33 H. 8, but only trusts such as are now in practice and retained in Chancery, I know not. It was agreed in the *Earl of Somerset’s case*, and so resolved in *Abington’s case*, that a trust of a freehold was not forfeited by attainder of treason. But how this resolution in *Abington’s case*, can stand with the statute of 33 H. 8, I see not: for certainly the uses there mentioned could be no other than trusts; and therefore the *equity* or *trust itself*, in cases of attainder of treason, seems forfeited by the statute, though possibly the *land itself* be not in the King” (q).

Whether equities of redemption subject to forfeiture.

7. *Equities of redemption* appear to have been made forfeitable for attainder of treason by 33 H. 8 (r); for the statute enumerates *conditions*, and the interest of the mortgagor is a condition, which, though broken at law, is saved whole to him in a Court of equity.

Trusts of chattels forfeitable upon conviction.

8. Trusts of *chattels*, whether real or personal, were always forfeitable to the Crown upon conviction (s); and

(o) Hard. 495; S. C. Nels. 131; S. C. Freem. 130.

(p) 1 P. C. 218.

(q) In *Attorney-General v. Sands*, it was laid down, according to Nelson’s report (p. 131), that the estate was executed in the King by force of the statute; but, according to Freeman (p. 130), that the estate was to be executed in the King by a Court of equity, which seems the better opinion.

(r) Anon case, cited *Reeve v. Attorney-General*, 2 Atk. 223.

(s) *Wike’s case*, Lane 54, agreed; *King v. Dacombe*, Cro. Jac. 512; Jenk. 190, case 92; *Attorney-General v. Sands*, Hard. 405; *Pawlett v. Attorney-General*, Hard. 467, per Lord Hale; Sir J.

if a term was in trust for the *wife* of the felon, but not for her separate use, it seems the trust was affected by the forfeiture of the husband (*t*). But * the wife [* 821] would still be entitled to a provision under her equity to a settlement (*u*).

9. In these cases the forfeiture did not reach the legal estate vested in the trustee, but entitled the Crown to sue a *subpoena* in equity. (*v*). Crown entitled to *subpoena*.

10. If a felon at the time of his conviction was only contingently entitled, and before the interest vested he had undergone his punishment, no forfeiture accrued (*w*). But otherwise, if the interest vested before the term of imprisonment expired (*x*). And it was held that where a felon was entitled to a share of proceeds from the sale of real estate, but the sale was not to be made till after the death of A., and the felon had undergone his punishment in the lifetime of A., in this case, as the Crown had no equity during the life of A. to compel a conversion, the Crown was not entitled; otherwise where the time of sale had arrived and the sale had been actually made *before* the felon had suffered his punishment (*y*). Money liable to be laid out in the purchase of land was regarded as land and so protected from being forfeited as *personal* estate (*z*). No forfeiture of property to which a felon is entitled only contingently.

11. Now by 33 & 34 Vict. c. 23, it is enacted that "from and after the passing of the Act (4th July, 1870), no confession, verdict, inquest, conviction, or judgment of or for any treason, or felony, or *felo de se* shall cause any attainder or corruption of blood, or any forfeiture or escheat; provided that nothing in the Act shall affect the law of forfeiture consequent upon *outlawry*" (*a*). 33 & 34 Vict. c. 23.

12. At law a tenant for life might, until a modern statute (*b*), by certain tortious acts, as by a feoffment of the fee-simple, have forfeited his estate to the re- Of forfeiture by equitable tenant for life.

Dack's case, cited Holland's case, Aleyn, 16; *Re* Thompson's Trusts, 22 Beav. 506.

(*t*) Wike's case, Lane 54, *per* Barons Snig and Altham.

(*u*) See *ante*, p. 746.

(*v*) Holland's case, Al. 14; Sir J. Dack's case, as cited by Rolle, J., Id. 16; Attorney-General v. Sands, Hard. 495, *per* Lord Hale; and see *Kildare v. Eustace*, 2 Ch. Ca. 188; S. C. 1 Vern. 405, 419, 423, 428, 437.

(*w*) *Stokes v. Holden*, 1 Keen, 14; and see *Gough v. Davies*, 2 K. & J. 623; *Re* Bateman's Trust, 15 L. R. Eq. 355.

(*x*) *Roberts v. Walker*, 1 R. & M. 752.

(*y*) *Re* Thompson's Trusts, 22 Beav. 506.

(*z*) *Harrop's Estate*, 3 Drew. 726.

(*a*) See *supra*, p. 28.

(*b*) 8 & 9 Vict. c. 106, s. 4.

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mainderman (c) ; but had an *equitable* tenant for life affected to dispose of the *equitable* fee, no forfeiture would have accrued, for nothing passed beyond the grantor's actual interest (d). By the Act above referred to all conveyances are now innocent, that is, they pass nothing but what the grantor can lawfully part with.

[* 822]

* SECTION X.

OF ESCHAT.

Trust
formerly not
subject to
escheat.

Burgess v.
Wheate.

1. [UNTIL the recent Act (e)] a trust in fee of lands was not subject to escheat (f). This was determined in the great case of *Burgess v. Wheate* (g), before Lord Northington, assisted by Lord Mansfield and Sir T. Clarke. The arguments of these eminent judges will amply repay a very careful perusal. It may be mentioned generally, that Sir T. Clarke and Lord Mansfield, while they pursued different lines of reasoning, carried their principles to too great an excess. Sir Thomas Clarke contended that trusts must be governed strictly by *uses*, and, therefore, as no escheat in equity was of a use, there could be none of a trust. But this position is too large ; for trusts do not follow absolutely the law of uses : for then no curtesy would be of a trust, the judgment creditor would have no lien, and equitable interests would not be assets. Lord Mansfield, on the other hand, advanced the doctrine that, as lands escheat at law, so trusts must escheat in equity : that trusts, since the statute of H. 8, are not regulated by uses, but the maxim is "Equity follows law,"—"The *trust* is the *estate*." But to this it must be answered that a trust has always been recognised as a thing *sui generis*, and not as identical with the legal fee : it binds not, for instance, a purchaser for valuable consideration without notice. The intermediate opinions of Lord Northington are to be regarded as those most in accordance with the general system : trusts, he thought, were to be administered on the the footing of uses ; but not,

(c) See Co. Lit. 251, a.

(d) *Lethieullier v. Tracy*, 3 Atk. 728, 730 ; *Lady Whetstone v. Bury*, 2 P. W. 146.

(e) 47 & 48 Vict. c. 71.]

(f) *Attorney-General v. Sands*, Hard. 488 ; and see 1 *Harg. Jurid. Exerc.* 383.

(g) 1 Eden, 176 ; S. C. 1 W. Bl. 123.

as Sir Thomas Clarke maintained, to the exclusion of the improvements adopted subsequently to the statute of H. 8: he agreed with Lord Mansfield, that trusts imitated the legal possession; but he added the qualification *as between the privies to the trust only*, and not as respected strangers: his objection to the claim of the lord was, that it was for the execution of a trust that did not exist: where there was a trust, it should be considered in that Court as the real estate *between the cestui que trust and the trustee, and all claiming by or under them*; and the trustees should take no beneficial interest that the *cestui que trust* could enjoy; but he knew no instance where that Court ever permitted the creation of a trust to affect the right of a third person (h).

2. The result of the determination in *Burgess v. Trustees re Wheate*, as followed in more recent cases, was, that where the owner of the equitable fee died intestate without heirs the trustee retained the estate (i).

3. The same principle was applied by Sir John Romilly, M. R. to an equity of redemption; and his Honour decided, that, where there was a mortgage in fee and then the mortgagor died intestate without heirs, the equity of redemption did not escheat to the Crown, but belonged to the mortgagee, subject to the mortgagor's debts (k).

[4. Now by "The Intestates' Estates Act, 1884" (l), where a person dies without an heir and intestate as to any equitable estate or interest in any corporeal or incorporeal hereditament, whether devised or not devised to trustees by the will of such person, the law of escheat shall apply in the same manner as if the estate or interest were a legal estate in corporeal hereditaments.¹]

(h) 1 Eden, 251.

(i) *Taylor v. Haygarth*, 14 Sim. 16; *Davall v. New River Company*, 3 De G. & Sm. 394; *Cox v. Parker*, 22 Beav. 168; [*Keogh v. M'Grath*, 5 L. R. Ir. 478; *Re Mary Hudson's Trusts*, 52 L. J. N. S. Ch. 789.] As to estates *pur autre vie*, see p. 694, *supra*. And where a trust of real estate was created in favour of an alien, the Crown was entitled to the benefit of the trust as against both the trustee and the heir at law of the settlor; *Barrow v. Wadkin*, 24 Beav. 1; and see p. 44, *supra*.

(k) *Beale v. Symonds*, 16 Beav. 406.

(l) 47 & 48 Vict. c. 71, s. 4.]

¹ Similar statutes have been adopted in most of the United States so that now trust property is just as liable to escheat to the Commonwealth for want of heirs or next of kin to the last owner as are his legal estates.

SECTION XI.

THE DESCENT OF THE TRUST.

- Trust
descends as
the legal
estate.
1. A TRUST is governed by the same rules of descent as the legal estate is on which the trust is engrafted, and *that* whether the legal estate descends according to the course of common law, or is subject to a *lex loci*.
- Seisin *ex parte*
maternâ.
2. If one seised of land *ex parte maternâ* convey to a person in fee upon trust, and no trust is expressed, the resulting interest is part of the original estate, and will descend in the maternal line, and, failing the heirs on the part of the mother, will rather absolutely determine, than pass into the paternal line (*m*). But if [* 824] one * seised *ex parte maternâ* devise to A. and his heirs upon trust for a person for life, and then in trust to *convey* to the testator's heir at law, this breaks the descent, and the heir *ex parte paternâ* is entitled to the equitable remainder (*n*).
- Gavelkind.
3. If the land be subject to *gavelkind*, *borough English*, or other *custom*, the equitable interest will follow the same course of inheritance (*o*).
- Copyholds.
4. And a trust of *copyhold* as well as of freeholds is governed by the descent of the legal estate (*p*).
- Possessio
fratris.
5. The analogy to law is so strictly preserved, that, until a late Act, if the last *cestui que trust* had no seisin of the equitable estate corresponding to *possessio fratris* at law, the trust would have descended to the *brother of the half blood*, not to the *sister of the whole blood* (*q*). By the late Act, the *half blood* is now in all cases (but subject to the preferable claim of the whole blood) capable of inheriting estates, whether legal or equitable (*r*).

(*m*) *Burgess v. Wheate*, 1 Eden, 177, see 186, 216, 256; *Langley v. Sneyd*, 1 Sim. & St. 45; *Nanson v. Barnes*, 7 L. R. Eq. 250.

(*n*) *Davis v. Kirk*, 2 K. & J. 391; [and see *Re Douglas*, 28 Ch. D. 327.]

(*o*) *Fawcett v. Lowther*, 2 Ves. Sen. 304, *per* Lord Hardwicke; *Banks v. Sutton*, 2 P. W. 713, *per* Sir J. Jekyll; *Cowper v. Cowper*, 2 P. W. 720; *Jones v. Reasbie*, 22 Vin. Ab. 185, pl. 7; *Buchanan v. Harrison*, 1 J. & H. 662.

(*p*) *Trash v. Wood*, 4 M. & Cr. 324.

(*q*) *Banks v. Sutton*, 2 P. W. 713, *per* Sir J. Jekyll; *Cowper v. Earl Cowper*, *ib.* 736, *per eundem*; *Cunningham v. Moody*, 1 Ves. 174; Co. Lit. 14 b; and see the cases cited, *Casborne v. Scarfe*, 1 Atk. 604.

(*r*) 3 & 4 W. 4, c. 106, s. 9.

6. If a settlement contain a power of sale, with a trust to reinvest the proceeds in a purchase to the same uses, and the lands are sold, but the proceeds are not reinvested, though the bulk of the estate sold was of *gavelkind* tenure, yet if one of the uses be to A. and his heirs, the proceeds of the sale will descend to the *heirs of A. at common law*, and not to the heirs by the custom of *gavelkind* (s). Proceeds from sale of gavelkind lands.

7. An if *gavelkind* or *borough English* lands (t) be limited to a person's heirs as *purchasers*, the *common law* heirs and not the customary heirs are entitled; as, where a testator directed trustees to stand seised of *gavelkind* lands for the separate use of A. for life, and so as her husband should not intermeddle therewith, and after her death upon trust to convey to the heirs of her body for ever, Lord Hardwicke held that the trust was executory, and that the Court must therefore look to the intention, which was to give a life estate to A., and the remainder to the heirs as *purchasers* (u); * for, as the husband [* 825] was not to intermeddle therewith, his curtesy was to be excluded, which would not be the case if A. were tenant in tail. A conveyance of the legal estate was therefore directed to the *eldest* son and the heirs of his body, with remainder to the second son, and the heirs of his body, &c. "Not," added Lord Hardwicke, "according to the custom of *gavelkind*, because it must go according to the rule of common law, being not a trust executed, but executory" (v). Limitation to heirs as purchasers.

SECTION XII.

OF ASSETS.

THE general law relating to *assets*, as it stood previously to the Statute of Frauds may be thus stated.

1. The executor or administrator of the deceased was bound to apply his *personal estate* in payment of his debts; and this in the order of their legal priorities, as first of judgments, then of specialties, and then of sim- Legal assets.

(s) *Hougham v. Sandys*, 2 Sim. 95. see 153.

(t) *Polley v. Polley* (No. 2), 31 Beav. 363; [*Garland v. Beverley*, 9 Ch. D. 213.]

(u) Now by 3 & 4 W. 4, c. 106, s. 3, a limitation in a deed to the settlor or his heirs, or in a will to the *testator's heirs*, confers an estate *by purchase*.

(v) *Roberts v. Dixwell*, 1 Atk. 607; and see *Thorp v. Owen*, 2 Sm. & G. 90; *Sladen v. Sladen*, 2 J. & H. 369.

ple contract debts; or, as it was expressed, the personal estate was *legal assets*.

Assets by
descent.

2. Again, where the deceased had executed an instrument binding himself and his *heirs*, the heir to the extent of the real estate (except copyholds) which came to him, was bound to satisfy this obligation of his ancestor, or, in other words, the lands so inherited were *assets by descent*.

Equitable
assets.

3. The 32 Henry 8, c. 15, which first gave the power of *devising* lands, inadvertently opened a door to fraud, since it was held that if the owner of land devised it away, a creditor claiming by bond or other instrument binding the heir could not sue the *devisee*, and if he sued the *heir*, the latter might plead he had no land by descent. Where, however, the owner had by his will *charged* his lands with or devised them subject to the payment of debts, a Court of equity viewed the creditors as *cestuis que trust*, and made the land available in satisfaction of the debts; and in doing this it paid all the creditors *pari passu* without reference to their legal priorities, that is, the lands so charged or devised were *equitable assets*.

Equitable
interests.

4. With these prefatory remarks we proceed to the consideration of *equitable interests* as assets *before the Statute of Frauds*.

Trusts of
chattels are
assets.

[* 826] * 5. The trust of a *chattel* was always accounted assets in equity (*w*); by which is meant, not *equitable assets*, but assets for the due application of which in payment of debts the personal representative was responsible in *equity*, if not at law.

Trusts of a
freehold.

6. But whether the trust of a *freehold* should be assets in the hands of the heir for payment of debts by specialty was for a long time *vexata quæstio*. On the one hand it was argued, that the trust ought to follow the use, and that the use was *not* liable to a bond creditor; on the other hand it was said, that trusts since the Statute of Uses had been conducted by the Courts on more liberal principles, and, as the legal fee was available to the discharge of specialty debts at law, so a Court of equity ought to adopt the same rule in the administration of trusts.

Bennet v.
Box.

It was determined by Lord Hale, Chief Justice Hyde, and Justice Windham, in the case of *Bennet v. Box*, that a trust in fee should not be assets (*x*); and Lord Keeper Bridgman afterwards felt himself bound by the

(*w*) Attorney-General v. Sands, Freem. 131; Barthrop v. West, 2 Ch. Rep. 33; Duke of Norfolk's case, 3 Ch. Ca. 10. See *post*, § 27.

(*x*) 1 Ch. Ca. 13.

authority of this decision in respect of a *trust* (y), though he doubted somewhat as to an *equity of redemption* (z); and so the law as to a trust was laid down by Lord Hale in *Attorney-General v. Sands* (a),

The question was renewed before Lord Nottingham Grey v. Colville (b), when trust estates were declared to be *assets in equity*. The case was afterwards reheard before Lord Guildford, and is reported by Vernon under the title of *Creed v. Colville* (c), and his Lordship said, he "should be much governed by the case of *Bennet v. Box*, unless they could show that the latter precedents had been otherwise," and directed them to attend him with precedents towards the latter end of the term. The cause was brought on again the December following, and the Court ordered that the parties should attend the two Chief Justices and the Lord Chief Baron, who were desired to certify their opinion on the question (d). In Michaelmas term the next year, upon the motion of the defendants, it was ordered, that, unless plaintiffs, the creditors, procured the certificate of the Lords Chief Justices' and Lord Chief Baron's opinion by the first day of the next term, *the bill should be dismissed without further motion* (e). No further proceedings * appear in the case; and, [*827] therefore, it must be concluded that the bill was dismissed. There can be no doubt, however, that Lord Nottingham's decision was correct, and in *Goffe v. Whalley* (f) the question was renewed, but the result does not appear, unless the overruling of the heir at law's demurrer to the creditor's bill was on the ground that the Court held the trust to be assets.

7. Thus stood the law before the Statute of Frauds (g). Statute of By the 10th section of that Act a trust in fee-simple Frauds. was declared to be assets by descent. But the enactment was taken to embrace *simple* trusts only, and not *complicated* trusts (h), or equities of redemption (i),

(y) *Pratt v. Colt*, 1 Ch. Ca. 128 ; S. C. Freem. 139.

(z) *Trevor v. Peryor*, 1 Ch. Ca. 148.

(a) *Hard.* 490 ; S. C. Freem. 131 ; S. C. Nels. 134.

(b) 2 Ch. Rep. 143.

(c) 1 Vern. 172.

(d) R. L. 1683, A fol. 166.

(e) R. L. 1684, A. fol. 210.

(f) 1 Vern. 282, Raithby's edit.

(g) 29 Car. 2, c. 3.

(h) The former part of the clause, which enables the sheriff to take a trust in execution, was construed not to include a *complicated* trust, and therefore it is presumed the latter part of the clause could not be differently interpreted.

(i) *Plunket v. Penson*, 2 Atk. 293, *per* Lord Hardwicke; *Solley v. Gower*, 2 Vern. 61, *per* Lord Jeffries.

so that the question still remained whether such interests as were not within the statute might not still, upon the *general principles* of equity, be treated as assets by analogy to law. This was expressly so decided as to equities of redemption in *Plucknet v. Kirk* (*k*) and other cases (*l*); and upon principle, the rule governing equities of redemption ought equally to be applied to every other equitable interest.

3 & 4 W. 4, c.
104.

8. The question is now of little importance, as it was enacted by 3 & 4 W. 4 c. 104, that all a person's "*estate or interest*" (which must include any trust), in lands, tenements or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customaryhold, or copyhold, should be assets for the payment of debts as well on simple contract as on specialty.

Whether a
trust is legal
or equitable
assets.

9. There remains to be considered the question, whether a trust shall, as to persons who died before *1st January, 1870* (*m*), be administered as *legal or equitable* assets.

Trust of a
chattel.

10. It has in some cases been considered that the mere circumstance that property was *equitable* at the testator's death, was sufficient to make it *equitable assets* (*n*), but this is clearly erroneous, the question being, not whether the assets can be recovered at law or in equity, but whether the *creditor* can obtain payment thereout only from a Court of equity (*o*). Now if an executor recover money in that character under a [** 828*] trust or other equitable right, the ** proceeds, when actually come to his hands*, will be legal assets, even in a Court of law (*p*); and it would be an inconsistency to say, that if the property has been reduced into possession, a Court of equity shall administer it as legal assets, but if it be outstanding at the time when the creditor institutes proceedings in equity, it shall be administered as equitable assets. Upon this principle it has at length been established after much fluctuation (*q*), that equitable interests in personal estate are

(*k*) 1 Vern. 411; Reg. Lib. 1686, B. fol. 181, 844; and see Lord Jeffries' opinion in *Solley v. Gower*, 2 Vern. 61.

(*l*) Anon. Freem. 115; *Acton v. Peirce*, 2 Vern. 480; *Plunket v. Penon*, 2 Atk. 290.

(*m*) See post, 831.

(*n*) *Cox's Case*, 3 P. W. 341, and note Ib.; *Hartwell v. Chitters*, Amb. 308; *Clay v. Willis*, 1 B. & C. 372.

(*o*) *Cook v. Gregson*, 3 Drew. 549.

(*p*) *Hawkins v. Lawse*, 1 Leon. 155, *per* Periam, J.; *Anon case*, 1 Roll. Rep. 56; *Harwood v. Wrayman*, cited Ib.; S. C. reported Mo. 858.

(*q*) See cases cited in note (*h*) p. 827; and *Morgan v. Sherrard*,

to be distributed as legal assets (r). "Whether," observed Sir R. Kindersley, "the assets are such that the executor can recover them in a Court of law or in a Court of equity only is immaterial. The true test is, whether he recovers them *"virtute officii."* If the assets come to his hands *as executor*, a Court of law would treat them as assets and they are to be administered (in equity) as legal assets" (s).

11. A trust in *fee* stands in a very different light from the trust of a *chattel* in the hands of the executor. As regards the inheritance, until modern Acts (t), it was only in respect of creditors by specialty in which the heirs were bound, that the question of legal or equitable assets could in fact have arisen, for specialties in which the heirs were not bound, and simple-contract debts, were not payable out of real estate, and statutes and judgments though *liens*, to a partial extent, upon the equitable fee, were not payable as debts, but as incumbrances. In respect then as specialties in which the heirs were bound, a plain and simple trust was made assets in a Court of law in the hands of the *heir* by the Statute of Frauds, and therefore was *legal assets* in equity (u); but complicated trusts, and equities of redemption, were not touched by the statute; and it would seem, upon principle, that as equity subjected the trust to specialty creditors by analogy only to law, the Court ought, by observing the analogy throughout, to adopt the *legal course of administration*.

Trust in fee
in the hands
of the heir.

In the case of *Grey v. Colville*, before referred to, in which bond-creditors, had, *after* the debtor's decease, entered up judgments against the *heir* who took by descent; it appears to have been *assumed by [*829] the litigants, and was decreed by Lord Nottingham, than whom a Chancellor had a more just conception of the true nature of trusts, that the creditors should be paid *according to the priority of their judgments* out of a trust in fee (v).

Grey v.
Colville.

12. In the case of the *devise* of a *trust* in fee, the

1 Vern. 293; *Wilson v. Fielding*, 10 Mod. 426; S. C. 2 Vern. 763; *Sharpe v. Earl of Scarborough*, 4 Ves. 541.

(r) *Cook v. Gregson*, 3 Drew. 547; *Shee v. French*, Ib. 716; *Christy v. Courtenay*, 26 Beav. 140; and see *Lovegrove v. Cooper*, 2 Sm. & G. 271; *Mutlow v. Mutlow*, 4 De G. & J. 539.

(s) *Cook v. Gregson*, 3 Drew. 547.

(t) 47 G. 3, c. 74, Sess. 2, as to traders only; and 3 & 4 Will. 4, c. 104, which will be noticed presently.

(u) *Plunket v. Penon*, 2 Atk. 293, *per* Lord Hardwicke; *King v. Ballett*, 2 Vern. 248.

(v) *Grey v. Colville*, 2 Ch. Rep. 143; and see *Morrice v. Bank of England*, 2 Sw. 585; *Dollond v. Johnson*, 2 Sm. & G. 301.

Whether
trust in fee
devised is
legal or
equitable
assets.

analogy presented by the case of the devise of a *legal fee* ought, it is conceived, to be pursued. By 3 & 4 W. & M. c. 14, the power of the owner of the land to devise it away in fraud of his creditors (*w*) was first restrained, and a remedy was given against the heir and devisee jointly, in respect of the property so devised. The statute, however, expressly excepted from its operation, as do also the subsequent Acts enlarging the creditors' remedies (*x*), devises clothed with a trust or charge for payment of debts. It is conceived, that the true test whether an equitable estate in fee devised shall be legal or equitable assets, is, whether the estate *if legal and devised in similar terms* would have constituted legal or equitable assets (*y*).

3 & 4 W. 4,
c. 104.

13. By 3 & 4 W. 4, c. 104, it was enacted that when any person should die seized of or entitled to any *estate or interest* in lands, tenements, or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customaryhold, or copyhold, *which he should not by his last will have charged with, or devised subject to the payment of his debts*, the same should be assets, *to be administered in Courts of equity* for the payment of the just debts of such person, as well debts due on simple contract as on specialty; and that the heir or heirs at law, customary heir or heirs, devisee or devisees of such debtor, should be liable to all the same suits in equity at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as the heir or heirs at law, devisee or devisees of any person or persons, who died seized of freehold estates, was or were before the passing of that Act liable to in respect of such freehold estates, at the suit of creditors by specialty in which the heirs were bound: provided always that in the administration of assets *under and by virtue of that Act* all creditors by specialty in which the heirs were bound should be paid the full amount of the debts due to them before any of the creditors, by simple contract, or by specialty in which the heirs were not bound, should be paid any of their demands.

Contraction
of the Act.

[* 830] * Upon the construction of this statute the following observations occur:—

(*w*) See p. 206, *supra*.

(*x*) 47 G. 3, c. 74, Sess. 3; 11 G. 4, & 1 W. 4, c. 47; 3 & 4 W. 4, c. 104.

(*y*) See *Plunket v. Penon*, 2 Atk. 51, 290; *Sharpe v. Earl of Scarborough*, 4 Ves. 538; and the observations on those cases in 3rd edit. p. 690.

α. The Act creates a *general* charge on the estate for the benefit of creditors (*z*), subject only to the right of alienation in the heir or devisee (*α*).

β. The words "assets to be administered in equity" mean only that the creditor's *remedy* shall be in equity, and not that the estate shall be administered as *equitable assets*, and therefore the estate is to be distributed as legal assets (*β*).

γ. But no right of retainer is given to the heir or devisee for a debt due to him on simple contract. But it would seem that there is such a right of retainer in respect of a specialty debt (*γ*).]

δ. The express terms of the Act giving priority to creditors by specialty in which the heirs are bound over creditors by specialty in which the heirs are not bound, have, as a matter of course had full effect given to them (*δ*).

ε. The Act makes no mention of debts by *judgment* or by *decree of a Court of equity*, so that the remedies for the recovery of these out of the real estate may perhaps be viewed as still depending upon the general law (*ε*).

(*z*) *Kinderley v. Jervis*, 22 Beav. 1.

(*α*) See cases, p. 249, note (*g*).

(*β*) *Foster v. Handley*, 1 Sim. N. S. 200; more fully reported, 15 Jur. 73; *Re Burrell*, 9 L. R. Eq. 443; [but see *Re Illidge*, 24 Ch. D. 654, in which the earlier cases were not cited, where it seems to have been assumed by Chitty, J., that the assets were to be administered as equitable assets; and see S. C. on appeal 27 Ch. D. 478.]

[(*γ*) *Re Illidge*, 24 Ch. D. 654; 27 Ch. D. 478; explaining *Ferguson v. Gibson*, 14 L. R. Eq. 379. The foundation of the rule, allowing the right of retainer out of the real estate to an heir at law or devisee being a specialty creditor, was, that he might not be under a disadvantage by not being able to sue himself; since, if he could not retain, other creditors might have obtained priority over him by suing him. But a simple contract creditor could not get a judgment giving him priority, and so the rule had no application in his case. There appears to be nothing in 32 & 33 Vict. c. 46 to take away from a creditor by specialty in which the heir is bound the old right of action against the heir or devisee, and it seems to follow that the statute, by making real estate liable to be administered by Courts of equity, no more takes away the right of the heir or devisee to retain, than the power of Courts of equity to administer personal estate takes away an executor's right of retainer; *Re Illidge ubi supra*.]

(*δ*) *Richardson v. Jenkins*, 1 Drew, 477.

(*ε*) *Judgments* against the *testator* or *intestate* and decrees in equity against the *testator* or *intestate* are paid out of the personal estate *pari passu*. *Decrees* (if for payment of money or costs) were by 1 & 2 Vict. c. 110, s. 18 (though they were not formerly, *Bligh v. Darnley*, 2 P. W. 619, *Mildred v. Robinson*, 19 Ves. 585,) *liens* upon the real estate; and they always ranked as of equal degree with judgments in the administration of *personal* estate,

32 & 33 Vict. c. 46. [* 831] *14. As regards the administration of estates of persons who may have died *on or after 1st January, 1870*, the legislature has now abolished the distinction between *specialty* and *simple contract* debts, and has directed all specialty and simple contract debts to be paid *pari passu* (f). [But this does not interfere with or enlarge the right of retainer of the executor (g).]

[Retained by executor.]

15. Where there are specialty debts and simple contract debts, and the right of retainer of the executor is in respect of a simple contract debt, the assets should be apportioned on the footing of giving all the creditors an equal dividend. The dividend in respect of the specialty debts is payable to them in full, and out of the residue of the assets the executor will retain his debt, and the surplus, if any, is divisible ratably among the other simple contract creditors (h).

[Administration in bankruptcy of estate of deceased debtor.]

16. By the Bankruptcy Act, 1883 (i), sect. 125, an order may be made in bankruptcy for the administration according to the law of bankruptcy of the estate of a deceased debtor; but the order is not to be made un-

and therefore above specialty or simple contract debts; *Searle v. Lane*, 2 Vern. 37, *Foly's case*, 2 Eq. Ca. Ab. 450; *Stasby v. Powell*, 1 Freem. 333; *Peploe v. Swinburn*, Bumb. 48. Judgments and decrees against the *personal representative* are paid out of legal assets in the order of their dates; *Dollond v. Johnson*, 2 Sm. & G. 301, and cases cited, *Ib.* When dockets were in use, a judgment against a person had no priority in the administration of his assets over other debts unless it was docketed; *Hickey v. Hayter*, 6 T. R. 384; *Landon v. Ferguson*, 3 Russ. 349. But when the docket was closed the judgment had priority *per se*, and the executor or administrator was bound by that priority though he had no notice, and no means of obtaining notice of the judgments; *Fuller v. Redman*, 26 Beav. 600. To remedy this inconvenience it was enacted by Lord St. Leonard's Law of Property Amendment Act, 23 & 24 Vict. c. 38, ss. 3, 4, that judgments should have no priority in the administration of assets unless they were registered. But the Act does not apply where the judgment is recovered against the executor or administrator, as in that case the personal representative has full notice necessarily, and no remedy is required; *Jennings v. Rigby*, 33 Beav. 198; *Gaunt v. Taylor*, 3 Man. & G. 886, and 3 Scott (N.S.) 700; *Re Williams' Estate*, 15 L. R. Eq. 270. And the Act is retrospective, so that an unregistered judgment, though entered up against a debtor living at the date of the Act has no preference; *Kemp v. Waddingham*, 1 L. R. Q. B. 355. But otherwise, where the debtor was dead at the date of the Act, so that the creditor had acquired a vested right; *Evans v. Williams*, 2 Dr. & Sm. 324.

(f) 32 & 33 Vict. c. 46.

[(g) *Re Williams' Estate*, 15 L. R. Eq. 270; *Crowder v. Stewart*, 16 Ch. D. 368; *Wilson v. Coxwell*, 23 Ch. D. 764.]

[(h) *Wilson v. Coxwell*, 23 Ch. D. 764.]

[(i) 46 & 47 Vict. c. 53.]

til the expiration of two months from the date of the grant of probate or letters of administration, unless with the concurrence of the legal personal representative, or unless an act of bankruptcy is proved to have been committed by the debtor within three months prior to his decease. And even where proceedings for administration of the debtor's estate have been instituted in another Court, such Court may, on the application of any creditor having a qualifying debt, and on proof that the estate is *insufficient to pay [* 832] its debts, transfer the proceedings to the bankruptcy Court, and thereupon the bankruptcy Court can make an order for the administration of the estate according to the law of bankruptcy. It is, however, in the discretion of the Court in which the estate is being administered to retain the administration, and where the estate was small, the number of creditors small, and considerable expense had been incurred in the administration before the application of transfer was made, the Court refused to order the transfer; and expressed a doubt whether a creditor who had not proved his debt had any *locus standi* to apply for the transfer (*k*). By sub-sect. (5), upon an order being made for administration, the property of the debtor vests in the official receiver as trustee, and he is to realize and distribute it in accordance with the provisions of the Act. But by sub-sect. (7) he is to have regard to any claim by the legal personal representative of the deceased debtor to payment of the proper funeral and testamentary expenses incurred by him, and such claims are to be deemed a preferential debt, and paid in full out of the debtor's estate, in priority to all other debts. By sub-sect. (8) any surplus assets, after payment in full of all debts, costs of administration, and interest, are to be paid over to the legal personal representative of the debtor, or dealt with in such other manner as may be prescribed. By sub-sect. (9) notice to the legal personal representative of a deceased debtor of the presentation by a creditor of a petition under the section, if an order for administration is made thereon, is to be equivalent to notice of an act of bankruptcy, and after such notice no payment or transfer of property made by the legal personal representative is to operate as a discharge as between himself and the official receiver, but save as aforesaid nothing in the section is to invalidate any payment made or any act or thing done in good

[*(k)* *Re Weaver*, W. N. 1885, p. 74; *Re Weaver* is now reported in 29 Ch. D. 236.]

faith by the legal personal representative before the date of the order for administration.

If an order for administration be made under this section, the executor's right of retainer will, as from the time of his receiving notice of the petition, cease so far as regards any assets not actually retained at the date of the notice.]

* CHAPTER XXVIII. [* 833]

RELIEF OF THE CESTUI QUE TRUST AGAINST THE
FAILURE OF THE TRUSTEE.

WE have now pointed out in what the estate of the *cestui que trust* primarily consists. We have also examined what are the incidents and properties of it by analogy to estates at law or by statute. It follows next that we speak of certain *collateral or subsidiary rights*, by which the *cestui que trust* is supported in the enjoyment of his equitable interest against the various accidents to which an estate, not direct, but transmitted through the instrumentality of another, must necessarily be exposed. In the present chapter we shall consider the force of the maxim, "A trust shall not fail for want of a trustee."

1. It is a general rule that, whenever the intention of the settlor can be clearly collected, and there is no want of consideration, the Court will follow the estate into the hands of the *legal* owner, not being a purchaser for value without notice, and compel him to give effect to the trust by the execution of the proper assurance. Trust follows the estate.

Thus, if a deviser or settlor appoints a trustee, who either dies in the testator's lifetime (*l*), or disclaims (*m*), or is incapable of taking the estate (*n*), or if the trustee otherwise fail (*o*), the trust is not thereby defeated, but fastens on the conscience of the person upon whom the legal estate has devolved.¹ "I take it," said Lord Chief Justice Wilmot, "to be a first and fundamental principle in equity, that *the trust follows the legal estate wheresoever it goes, except it comes into the hands of a purchaser for valuable consideration without notice.* A Court of equity considers devises of trusts as * distinct substantive devises, stand- [* 834]

Trustee dying in testator's lifetime, or otherwise failing.

(*l*) *Moggridge v. Thackwell*, 3 B. C. C. 528; S. C. 1 Ves. jun. 475, *per* Lord Thurlow; *Attorney-General v. Downing*, Amb. 552, admitted; *Tempest v. Lord Camoys*, 35 Beav. 201.

(*m*) *Backhouse v. Backhouse*, V. C. of Eng. 20 Dec. 1844.

(*n*) *Sonley v. Clockmakers' Company*, 1 B. C. C. 81; *Anon. case*, 2 Vent. 349; *White v. Baylor*, 10 Ir. Eq. Rep. 53, 54.

(*o*) *Attorney-General v. Stephens*, 3 M. & K. 347.

¹ *White v. Hampton*, 13 Io. 259; *Treat's App.* 30 Conn. 43; *McCartney v. Bostwick*, 32 N. Y. 53; *Vidal v. Girard*, 2 How. 128.

ing on their own basis, independent of the legal estate: and the *legal estate* is nothing but the *shadow which always follows the trust estate* in the eye of a Court of equity" (*p*).

Direction to sell, and no person to sell named.

2. If a testator direct a sale of his lands for certain purposes, but *omits to name a person* to sell, the trust attaches upon the conscience of the heir, and he is strictly bound in equity to give effect to the intention (*q*).

Direction for separate use and no trustee appointed.

3. So, if [before the Married Women's Property Act, 1882,] the lands were devised (*r*), or a sum of money was bequeathed (*s*) to a *feme covert* for her sole and separate use, but without the interposition of a trustee, the property vested at *law* in the husband, in her right, but in *equity* he held upon trust for the separate use of the wife.¹

Failure of trustee of a power imperative.

4. We have seen, in a former chapter, that powers are distributable into powers *arbitrary* and powers *imperative*, and that powers *imperative* do in reality partake of the nature of trusts. Upon this ground the Court protects a *cestui que trust* from the failure of the donee of a power imperative, as it would do from the failure of any other trustee. "If," said Lord Eldon, "the power be one which it is the duty of the party to execute—made his duty by the requisition of the will—put upon him as such by the testator, who has given him an interest extensive enough to enable him to discharge it, he is a *trustee for the exercise of the power*, and not as having a discretion whether he will exercise it or not; and the Court adopts the principle as to trusts, and will not permit his negligence, accident, or other circumstances to disappoint the interests of those for whose benefit he is called upon to execute it" (*t*).² "As to the objection," said Lord Chief Justice Wilmot,

(*p*) Attorney-General v. Lady Downing, Wilm. 21, 22.

(*q*) First clearly settled in Pitt v. Pelham, Freem. 134.

(*r*) Bennett v. Davis, 2 P. W. 316; Major v. Lansley, 2 R. & M. 355.

(*s*) Rollfe v. Budder, Bunb. 187; Tappenden v. Walsh, 1 Phillim. 352; Prichard v. Ames, T. & R. 222; Parker v. Brooke, 9 Ves. 583; and see Roberts v. Spicer, 5 Mad. 491; Wills v. Sayers, 4 Mad. 409; Rich v. Cockell, 9 Ves. 375. At first there was some doubt: Harvey v. Harvey, 1 P. W. 125; Burton v. Pierpoint, 2. P. W. 78.

(*t*) Brown v. Higgs, 8 Ves. 574.

¹ Jamison v. Brady, 6 S. & R. 466; Vance v. Nogle, 20 P. F. Smith, 179; Vanier's App. 30 P. F. Sm. 140; Trenton Banking Co. v. Woodruff, 1 Green, 117; Fears v. Brooks, 12 Geo. 195; Barron v. Barron, 24 Vt. 375.

² Babbitt v. Babbitt, 26 N. J. Eq. 44.

"that these powers are personal to the trustees, and by their deaths become unexecutable, they are not *powers*, but *trusts*, and there is a very essential difference between them. *Powers* are never imperative—they leave the act to be done at the will of the party to whom they are given. *Trusts* are always imperative, and are obligatory upon the conscience of the party intrusted. This Court supplies the *defective execution* of powers, but never the * *non-execution* of them, for the [* 835] powers are meant to be *optional*. But the person who creates a trust means it should *at all events* be executed. The individuals named as trustees are only the nominal instruments to execute that intention, and if they fail, either by death, or by being under disability, or by refusing to act, the constitution has provided a trustee. Where no trustees are appointed at all, this Court assumes the office. There is some personality in every choice of trustees; but this personality is *res unius ætatis*, and, if the trust cannot be executed through the *medium* which was in the primary view of the testator, it must be executed through the *medium* which the constitution has substituted in its place. A college was to be founded under the eye of five trustees: that cannot be: the death of the trustees frustrates that *medium*. What then? Must the end be lost because the means are by the act of God become impossible? Suppose the question had been asked the testator, 'If the trustees die or refuse to act, do you mean no college at all, and the heirs take the estate?' No: I trust them to execute my intention: I do not put it into their power whether my intention shall ever take place at all" (*u*).¹

5. If trustees, then, have an *imperative power* committed to them, and they either die in the testator's lifetime (*v*), or decline the office (*w*), or disagree among themselves as to the mode of execution (*x*), or do not declare themselves before their death (*y*), or if from

Trustee of a discretion dying in testator's lifetime, declining office, &c.

(*u*) Attorney-General v. Lady Downing, Wilm. 23.

(*v*) Attorney-General v. Lady Downing, Wilm. 7; S. C. Amb. 550; Attorney-General v. Hickman, 2 Eq. Ca. Ab. 193; Maberly v. Turton, 14 Ves. 499.

(*w*) Doyley v. Attorney-General, 2 Eq. Ca. Ab. 194; Gude v. Worthington, 3 De G. & Sm. 389; Izod v. Izod, 32 Beav. 242.

(*x*) Moseley v. Moseley, Rep. t. Finch, 53; and see Wainwright v. Waterman, 1 Ves., jun. 311.

(*y*) Hewitt v. Hewitt, 2 Eden, 332; Flanders v. Clark, 1 Ves. 10, *per* Lord Hardwicke; Harding v. Glyn, 1 Atk, 469; Ray v.

¹ Gibbs v. Marsh, Miller v. Meetch, 8 Barr, 417; Grinke v. Grinke, 1 Des. Eq. 375, n.

* 33 LAW OF TRUSTS.

any other circumstance (*z*), the exercise of the power by the party intrusted with it becomes impossible, the Court will substitute itself in the place of the trustees, and will exercise the power by the most reasonable rule. And the Court assumes the jurisdiction of exercising the power *retrospectively* (*a*), and will take up the trust, whatever difficulties or impracticabilities may stand in the way (*b*); for, as Lord Kenyon laid down the rule strongly, if the trust can *by any possibility* be exercised [* 836] by the * Court, the non-execution by the trustee shall not prejudice the *cestuis que trust* (*c*)¹.

Mode of
execution.

Where the
settlor has
prescribed a
rule, the
Court will
adopt it.

6. In what *mode* the Court will execute the power will vary according to the circumstances of the case.

Where the discretion of the trustee is to be *governed by some rule*, or to be *measured by a state of facts, which the Court can enquire into as effectually as a private person*, then the Court can "look with the eyes of trustees," and will substitute its own judgment for that of the individual (*d*).

Gower v.
Mainwaring.

Thus in *Gower v. Mainwaring* (*e*), John Mainwaring executed a trust deed, by which the trustees were to give the residue of the real and personal estate among the settlor's relations *where they should see most necessity, and as they should think most equitable and just*. Two of the trustees died, and, the third refusing to act, it was discussed, how far the discretion of the trustees could be vicariously exercised by the Court. Lord Hardwicke said, "What differs it from the cases mentioned is this, that *here is a rule laid down for the trust*. Wherever there is a trust or power—for this is a mixture of both—I do not know that the Court can put itself in the place of those trustees, and exercise that discretion. Where trustees have power to distribute *generally according to their discretion without any object pointed out or rule laid down*, the Court interposes not; unless in case of a charity, which is different, the Court

Adams, 3 M. & K. 243 *per* Sir J. Leach; *Grieveson v. Kirsopp*, 2 Keen, 653; *Croft v. Adam*, 12 Sim. 639; *Re Hargrove's Trusts*, 8 I. R. Eq. 256.

(*z*) *Attorney-General v. Stephens*, 3 M. & K. 347; *Re Richards*, 8 L. R. Eq. 119.

(*a*) *Edwards v. Grove*, 2 De G. F. & J. 222 *per* L. J. Turner; *Maberly v. Turton*, 14 Ves. 499.

(*b*) *Pierson v. Garnet*, 2 B. C. C. 46, *per* Lord Kenyon.

(*c*) *Brown v. Higgs*, 5 Ves. 505.

(*d*) *Hewett v. Hewett*, 2 Eden, 332; *Maberly v. Turton*, 14 Ves. 499.

(*e*) 2 Ves. 87.

¹ *Faulkner v. Davis*, 18 Gratt. 651.

exercising a discretion as having the general government and regulation of charity. But *here is a rule laid down: the trustees are to judge of such necessity and occasions of the family: the Court can (f) judge of the necessity: that is a judgment to be made of facts existing, so that the Court can make the judgment as well as the trustees, and, when informed by evidence of the necessity, can judge what is equitable and just on this necessity,*" and his Lordship decreed a division among the relations (such relations to be restricted to those within the Statute of Distributions) according to their necessities and circumstances, which the Master should enquire into, and consider how it might be most equitably and justly divided (g)^{1 2}.

(f) In Mr. Belt's edition of Vesey there is the strange misprint of "cannot judge."

(g) 2 Ves. 110; and see *Liley v. Hey*, 1 Hare, 580.

¹ See *Bull v. Bull*, 8 Conn. 48.

² The execution of the power in this case in favour of the settlor's relations within the Statute of Distributions, according to their necessities, leads us to observe upon the construction of a direct bequest to a person's "poor or necessitous relations." It is commonly thought that the epithet "poor," "necessitous," or the like, is merely nugatory; but on examination there will appear to be considerable authority in favour of the contrary doctrine. It is perfectly settled, notwithstanding a case in which Lord Hardwicke is said to have held otherwise, (*Attorney-General v. Buckland*, cited 1 Ves. 231, Amb. 71,) that "relations," though accompanied with the words "poor," "necessitous," or the like, will be restricted to those within the Statute of Distributions. The only question, therefore, is whether *as among those within the statute* expressions of this kind will not be allowed their effect. In a case reported by Peere Williams (Anon. case, 1 P. W. 327), the bequest was to "poor relations," and the Countess of Winchelsea, one of the next of kin, was allowed a share, in regard the word "poor" was frequently used as a term of endearment and compassion rather than to signify indigence. It is evident that this case can have no application where the word "poor" is not of doubtful meaning, but is *clearly* to be taken in the sense of poverty and necessity. In *Widmore v. Woodroffe*, Amb. 636, the testator had given a third of the residue to be distributed "amongst the most *necessitous* of his relations." There was *only one relation within the Statute of Distributions*, and it was held that such relation was exclusively entitled. The only point decided, therefore, was, that the addition of the term "necessitous" would not extend the construction of the word "relations" to those *out of the statute*. Thus there appears to be no authority for holding the words to be nugatory *as among the relations within the statute*, while on the contrary side of the question there are, as we shall see, direct decisions. In *Brunsdon v. Woolledge*, Amb. 507, a testator gave 500*l.* to be distributed amongst his mother's *poor* relations, and Sir T. Sewell directed the fund to be distributed amongst the poor relations of the mother within the statute *who were objects of charity*. In *Mahon v. Savage*, 1 Sch. & Lef. 111, a testator gave 1000*l.* to be dis-

Construction of bequest to "poor relations."

How the Court will exercise the power where the settlor has laid down no rule. Equality is equity.

[* 837] * 7. Where the settlor has given *no rule or measure* by which the discretion is to be governed, the Court cannot in that case act upon mere caprice, but will execute the power by the most reasonable and intelligible rule that the circumstances of the case will admit. And upon ordinary occasions the Court proceeds upon the maxim, that *equality is equity* (h).¹ Thus in *Doyley v. Attorney-General* (i), a testator gave his real and personal estate to trustees upon trust to dispose thereof to such of his relations of his mother's side who were most deserving, and in such manner as they should think fit, and for such charitable uses and [* 838] purposes as they should also think * most proper and convenient: and the power having devolved upon the Court, Sir J. Jekyll directed that *one moiety* of the personal estate should go to the relations of the testator on the mother's side, and the *other moiety* to charitable uses, the known rule that *Equality is equity* being, he said, the best rule to go by. He had no rule of judging of the merits of the testator's *relations*, and could not enter into spirits, and therefore could not prefer the one to the other, but all should come in without distinction.

Words of gift and words of power distinguished.

8. With respect to the subject under consideration, the cases in which the donor's intention is expressed in the form of a *gift*, may admit of distinction from those in which it is expressed in the form of a *power*.

(h) *Doyley v. Attorney-General*, 2 Eq. Ca. Ab. 195; *Fordyce v. Bridges*, 2 Ph. 497; *Longmore v. Broom*, 7 Ves. 124; *Salisbury v. Denton*, 3 K. & J. 536; *Penny v. Turner*, 2 Ph. 493; *Izod v. Izod*, 32 Beav. 242; *Gray v. Gray*, 13 Ir. Ch. Rep. 404.

(i) 2 Eq. Ca. Ab. 195. See *Down v. Worrall*, 1 M. & K. 561; but there the two sets of objects were connected not by "and," but by "or;" and *Doyley v. Attorney-General* was not cited: see V. C. Wood's observations, 3 K. & J. 538.

tributed amongst his *poor* relations, or such other objects of charity as should be mentioned in his private instructions to his executors. No instructions were left, and Lord Redesdale held, that Lynam, *one of the next of kin within the statute*, was not entitled to a share, unless he was a poor person at the time of the payment of the legacy. We may also add the *dictum* of Lord Thurlow in *Green v. Howard*, 1 B. C. C. 33:—"The word 'relations,'" he said, "must be confined to the statute, but not always in the proportions of the statute: where the testator has said, to relations *according to their greater need*, the Court has shown particular favour to one." The argument that the Court cannot distinguish between the degrees of poverty as amongst the relations within the statute is also answered by the case of *Gower v. Mainwaring*, cited in the text, in which a direction for such a distinction was actually made.

¹ *Harrison v. Harrison*, 2 Gratt. 1; *Withers v. Yeadon*, 1 Rich. Ch. 324; *McNeillidge v. Galbrath*, 8 Serg. & R. 43.

If a fund be limited "upon trust for the children of A. as B. shall appoint;" the construction is, that the children of A. take a vested interest by the *gift*, subject to be divested by the exercise of the *power*. Therefore, on failure of the power, the children, who were the objects of the power, become absolutely entitled, just as if the discretion had never been annexed (*k*). But the gift is subject to the exercise of the power, and, therefore, if the power be testamentary, the donee of the power may well appoint in favour of those who may be living at his death, to the exclusion of those who may have predeceased him (*l*). [And where the will creating the power of appointment contained a recital that the testator had already provided for his children (who were the objects of the power), and did *not intend thereby to make any further provision* for them, it was held that the power was not a power coupled with a trust, and that the children were not entitled in default of appointment (*m*).]

Where an estate is vested in trustees "upon trust to dispose thereof among the children of A.," in this case the children take nothing by way of *gift*, but the transmission of their interest must be through the *medium* of the *power*. If the trust be to distribute *equally* among the objects, the bequest, though in the form of a power, must be tantamount to a simple gift (*n*); and if the trustees be at liberty to distribute *unequally*, and make no distribution, the Court itself executes the power, and divides the fund equally amongst the objects of it (*o*).¹

* 9. But, further, a discretion may be given [* 839] to the trustee, not only in respect of the *proportions* to be appointed, but also in respect of the *objects* to whom the appointment is to be made; as where a fund is be-

Upon trust to dispose amongst the children of A.

Discretion as to objects of the power.

(*k*) *Davy v. Hooper*, 2 Vern. 665; *Fenwick v. Greenwell*, 10 Beav. 412; *Madoc v. Jackson*, 2 B. C. C. 588; *Hockley v. Mawbey*, 1 Ves. jun. 143, see 149, 150; *Jones v. Torin*, 6 Sim. 255; *Falkner v. Lord Wynford*, 9 Jur. 1006.

(*l*) *Woodcock v. Renneck*, 4 Beav. 196; 1 Ph. 72; and see *Lambert v. Thwaites*, 2 L. R. Eq. 151.

[(*m*) *Carberry v. M'Carthy*, 7 L. R. Ir. 328.]

(*n*) *Phillips v. Garth*, 3 B. C. C. 64; *Rayner v. Mowbray*, Ib. 234.

(*o*) *Hands v. Hands*, cited *Swift v. Gregson*, 1 T. R. 437, note; *Pope v. Whitcombe*, 3 Mer. 689, corrected from Reg. Lib. 2 Sugd. Powers, 650, 6th ed.; *Walsh v. Wallinger*, 2 R. & M. 78; *S. C. Taml.* 425; *Grievson v. Kirsopp*, 2 Keen, 653; *Brown v. Pocock*, 6 Sim. 257; *Finch v. Hollingsworth*, 21 Beav. 112; *Re White's Trusts*, Johns. 656.

¹ See *Hoag v. Kenney*, 25 Barb. 396.

queathed to trustees with a discretionary power of distribution to *such* of a class as the trustees shall think fit.

Whether to be regarded as a trust or power.

Harding v. Glyn.

In the last case the question first to be resolved is, Did the settlor intend to communicate a *mere power* or to create a *trust*?

In *Harding v. Glyn* (*p*), a testator gave to Elizabeth his wife a house and certain goods and chattels, "but *desired* her at or before her death to give the same unto and among *such* of the testator's relations as she should think most deserving and approve of." The wife died without having made any appointment, and the Court considered a *trust* was created, and divided the estate equally amongst the testator's relations living at the time of the wife's death.

Marlborough v. Godolphin.

In *The Duke of Marlborough v. Lord Godolphin* (*q*), Lord Hardwicke held, in a similar case, that there was merely a *power* and no trust.

Brown v. Higgs.

In *Brown v. Higgs* (*r*), on the contrary, where the introductory words used were, "*I authorise and empower*," Lord Alvanley decided that there was a *trust*. The cause was reheard before his Lordship, and after grave consideration on the subject, he decreed as before (*s*). The decree was afterwards affirmed on appeal, by Lord Eldon (*t*), and again affirmed in the House of Lords (*u*).

The doctrine of *Harding v. Glyn* now established.

The doctrine of *Harding v. Glyn* has since been affirmed by other authorities (*v*), and may be now viewed as established. The rule has thus been laid down by Lord Cottenham: "When there appears a general intention in favour of *individuals* of a class to be *selected by another person*, and the *particular* intention fails from that selection not being made, the Court will carry into effect the *general* intention in favour of the class" (*w*).

In favour of what objects the Court will exercise a power imperative.

10. The question in favour of *what objects* a power *imperative*, whether of *distribution* merely, or of *selection*, will be executed by *the Court, viz., whether in favour of those *living at the death of the testator*, or those *living at the death of the donee of*

(*p*) 1 Atk. 469, S. C. stated from Reg. Lib. in *Brown v. Higgs*, 5 Ves. 501.

(*q*) 2 Ves. sen. 61.

(*r*) 4 Ves. 708.

(*s*) 5 Ves. 495.

(*t*) 8 Ves. 561, see p. 576.

(*u*) 18 Ves. 192.

(*v*) *Birch v. Wade*, 3 V. & B. 198; *Burrough v. Philcox*, 5 M. & Cr. 72; *Penny v. Turner*, 2 Ph. 493; *Walsh v. Wallinger*, 2 R. & M. 78; *Re Caplin*, 11 Jur. N.S. 383, 2 Dr. & Sm. 527; and see *Salisbury v. Denton*, 3 K. & J. 535; *Re White's Trusts*, Johns. 656; *Re Eddowes*, 1 Dr. & Sm. 395; [*Pocock v. Attorney-General*, 3 Ch. D. 342; *Wilson v. Duguid*, 24 Ch. D. 244.]

(*w*) *Burrough v. Philcox*, 5 M. & Cr. 92.

the power, remains to be considered; and it is conceived that, in reference to this question, the following results may be deduced from the authorities.

First. Where a testator bequeaths property with a power *imperative* in favour of a class, whether of children, relations, or others, and it appears to be the intention that the distribution or selection should take place *as soon as conveniently may be* after the testator's death, then the Court will execute the power in favour of the class as existing at the date of the *testator's death* (x).

Secondly. Where the *frame* of the will does not of necessity point to an immediate exercise of the power, as where the donee of the power takes a *life estate* expressly, or by implication, the *nature of the power* given to the donee has to be taken into consideration:

a. If the devise or bequest be in the form not of a gift, but of a power to be exercised by *will* only, then, inasmuch as the objects of the power are necessarily those only living at the death of the donee, the Court executes the power in favour of those members of the class only who are *in esse* at the *death of the donee* (y). But the rule applies only where the class take *through the medium of a power*, for if there be a *gift* to them in the first instance, in such shares, &c., as the donee of the power shall appoint by will, then, in default of exercise of the power, the whole class take, whether they survive the donee of the power or not (z).

β. Where the power given to the tenant for life is not merely testamentary, but may be exercised either by *deed* or *will*, the question, whether the class to take is to be ascertained at the death of the testator or of the donee of the power, is involved in still further difficulty. The decisions which support an execution of the power in favour of the class of objects as existing at the *death of the donee* (a), and those which support

(x) *Brown v. Higgs*, 4 Ves. 708, &c.; *Longmore v. Broom*, 7 Ves. 124. The result will, of course, be the same where a life estate being given to the donee of the power, the donee dies in the testator's lifetime; see *Penny v. Turner*, 2 Ph. 493; *Hutchinson v. Hutchinson*, 13 Ir. Eq. Rep. 332.

(y) *Cruwys v. Colman*, 9 Ves. 319; *Birch v. Wade*, 3 V. & B. 198; *Walsh v. Wallinger*, 2 R. & M. 78; *Brown v. Pocock*, 6 Sim. 257; *Burrough v. Philcox*, 5 M. & Cr. 72; *Bonser v. Kinneir*, 2 Giff. 195; *Re Caplin's Will*, 2 Dr. & Sm. 527; *Freeland v. Pearson*, 3 L. R. Eq. 658; [*Sinnott v. Walsh*, 5 L. R. Ir. 27;] and see the analogous cases of *Woodcock v. Renneck*, 4 Beav. 190; 1 Ph. 72; *Finch v. Hollingsworth*, 21 Beav. 112.

(z) *Lambert v. Thwaites*, 2 L. R. Eq. 151.

(a) *Doyley v. Attorney-General*, 2 Eq. Ca. Ab. 195; *Harding v. Glyn*, 1 Atk. 469; *Pope v. Whitcombe*, 3 Mer. 689, corrected from Reg. Lib. 2 Sugd. Pow. 650, 6th ed.

[* 841] an execution in favour * of the class as existing at the death of the original testator (*b*), are almost evenly balanced; but the apparent absence of any full consideration of the question, and the circumstance that in some of the cases the power, though not expressly limited to an exercise by will, did not in terms authorize an execution by deed or writing, and may perhaps have been viewed by the Court as testamentary, detract from their value as authorities upon this point.

Upon principle, too, as well as upon authority, the question is attended with difficulty. On the one hand, the power may be properly exercised by the donee at any time before his death, and there is no obligation to exercise it earlier, and if any members of the class die before the power is exercised, they, according to the ordinary rule, cease to be objects of it. The donee of the power has an undoubted right to postpone the execution of it until the last moment of his life, and the only default which the Court has to supply, is the non-exercise *just before the death*, and that default must, therefore, be supplied in favour of those who were objects at the date of the death of the donee (*c*). On the other hand, the donee of the power may exercise it in favour of the class existing at the time of exercise, to the exclusion of those who have died before, and, also, where the power is one of selection to the exclusion of those who may come into *esse* subsequently, but the Court cannot act arbitrarily, and cannot show any favour, but must observe equality towards all. Who, then, are the objects of the power? As it was not the duty of the donee of the power to exercise it at one time more than another, the only objects of the power must be all those who might by possibility have taken a benefit under it, that is, those living at the death of the testator, and those who come into being during the continuance of the life estate (*d*); otherwise, should all the class predecease the tenant for life (an event not improbable, where *children* or some limited class of relations are the objects), there would be a power imperative which is construed as a trust, and no *cestui que trust*, a result which, it is conceived, the Court would be somewhat unwilling to adopt.

(*b*) *Hands v. Hands*, cited 1 T. R. 437, note; *Grieverson v. Kirsopp*, 2 Keen, 653; [*Wilson v. Duguid*, 24 Ch. D. 244.]

(*c*) See also observation by V. C. Wood in *Re White's Trusts*, Johns. 659, 660, a case different, however, from any of those discussed in the text, the donees of the power being trustees, who both died before the tenant of life.

[(*d*) See *Wilson v. Duguid*, *ubi supra*.]

[In a recent case where there was a residuary bequest to A. with a direction that "the whole principal at her death was to be *divided amongst her [* 842] children, if she had any, in such proportions as she should think fit," the late M.R. held, (1,) that A. had a power of appointment, either by instrument *inter vivos*, or by will; and (2), that, as she did not exercise the power, her surviving child and the representatives of her children who had died in her lifetime were entitled to participate in the property (e). It is observable that the power in this case was only one of distribution; but in a still later case (f), where the power was one of selection and distribution, the objects who had died in the lifetime of the donee of the power were held entitled to participate; but the decision in the latter case was also based upon other grounds. The cases in which an intention appears that there should be a *personal enjoyment* by the objects of the power stand on a different footing, and in these cases there is good ground for holding that the object must survive the donee of the power in order to participate (g); but apart from any such indication it is conceived that the true principle is that all persons in whose favour the power could at any time have been exercised are objects, and that they all are equally entitled to participate.]

γ. It is clear that where the donee tenant for life may exercise the power by *deed or will*, the members of the class in existence at the date of the death of the donee will alone take, if, upon the purview of the original instrument, they alone appear to be the objects of the power (h).

Whole purview of instrument must be regarded.

11. Where there is a power of appointment in favour of "relations," the donee of the discretion, if he have a power of *selection*, may appoint to relations in any degree (i)¹, and it is only in those cases where he has

Construction of the word "relations" Power of selection and power of distribution.

[(e) *Re Jackson's Will*, 13 Ch. D. 189.]

[(f) *Wilson v. Duguid*, 24 Ch. D. 244.]

[(g) *Re White's Trusts*, Johns. 656; *Re Phene's Trusts*, 5 L. R. Eq. 346.]

(h) *Winn v. Fenwick*, 11 Beav. 438; and see *Tiffin v. Longman*, 15 Beav. 275.

(i) *Supple v. Lowson*, Amb. 729; *Grant v. Lynam*, 4 Russ. 292; *Harding v. Glyn*, 1 Atk. 469; S. C. stated from Reg. Lib., *Brown v. Higgs*, 5 Ves. 501; *Mahon v. Savage*, 1 Sch. & Lef. 111; *Cruwys v. Colman*, 9 Ves. 324; *per* Sir W. Grant; *Spring v. Biles*, cited *Swift v. Gregson*, 1 T. R. 435, note (f); *Salisbury v. Denton*, 3 K. & J. 536; *Snow v. Teed*, 9 L. R. Eq. 622. In *Brunsdon v. Woolredge*, Amb. 507, Sir T. Sewell seems (contrary to his opin-

¹ *Huling v. Farrer*, 9 R. I. 410.

a mere power of *distribution* that he must confine himself to the relations within the Statute of Distribution of Intestate's Estates (*k*). But the Court, except [* 843] where the bequest *is for the benefit of *poor relations* by way of founding a charity (*l*), or the testator has furnished some intelligible rule by which the relations out of the statute may be easily ascertained (*m*), must in all cases appoint to the relations within the statute; for as on the one hand the Court cannot act arbitrarily by selecting particular objects, so on the other it cannot execute the power in favour of relations in general, for this would lead *ad infinitum* (*n*).

Whether relations shall take *per stirpes* or *per capita*.

12. A further point open to discussion is, in what *shares* such relations shall take,—whether those who in case of intestacy would have claimed by representation shall under the execution of the power by the Court takes *per stirpes* or *per capita*.

Now, the rule that those are deemed relations who would take a distributive share under the statute was adopted on the ground, that, unless some line were drawn for restricting the meaning of the word, a bequest to relations would be void for uncertainty. As this was the sole foundation for appealing to the statute at all, it is evident the single enquiry for the Court is, *who* would take a distributive share: *in what proportions* they would take is wholly beside the question, and in fact beyond the Court's jurisdiction; for when the class has been ascertained, the testator himself has de-

ion in *Supple v. Lowson*, *ubi supra*) to have confined the trustees to relations within the statute.

(*k*) *Isaac v. Defriez*, Amb. 595; but see the case stated from Reg. Lib., *Attorney-General v. Price*, 17 Ves. 373, note (*a*); *Carr v. Bedford*, 2 Ch. Rep. 146; *Lawlor v. Henderson*, 10 I. R. Eq. 150; *Pope v. Whitcombe*, 3 Mer. 689. The last case, and *Forbes v. Ball*, 3 Mer. 437, were both decided by Sir W. Grant, but appear to be contradictory; however, in the latter case the question raised was, not whether the donee had exceeded her power, but whether the discretion was a *power* or a *trust*; for if a power, and it had not been executed by the will, the fund would have sunk into the residue, and the plaintiff have been entitled as residuary legatee. Note, a power of selection will be implied in a case of "relations," where it would not have been implied in the case of "children;" *Spring v. Biles*, cited 1 T. R. 435, note (*f*); *Mahon v. Savage*, 1 Sch. & Lef. 111; *Salisbury v. Denton*, 3 K. & J. 536. In the last two cases the words were "*amongst* the relations," but see *Pope v. Whitcombe*, 3 Mer. 689, where the expression was similar.

(*l*) See *White v. White*, 7 Ves. 423; *Attorney-General v. Price*, 17 Ves. 371; *Isaac v. De Friez*, *Ib.* 373, note (*a*); and see *Mahon v. Savage*, 1 Sch. & Lef. 111.

(*m*) *Bennett v. Honeywood*, Amb. 708.

(*n*) Thus in *Bennett v. Honeywood*, *ubi supra*, 456 persons applied as relations within two years.

terminated the proportions by devising to the objects in words creating a joint tenacy (*o*). No distinction can be taken between real and personal estate; yet it could scarcely be held, that if *lands* were devised to the testator's "relations," the kindred within the statute would take in unequal proportions.

The result of the authorities would seem to accord with what is correct upon principle, viz, that *in a gift to "relations" (whether the testator has added the words "equally to be divided" or not) the distribution among the relations within the statute must be made per capita, and not per stirpes (p)*. The question can no longer arise * where the gift is to "*next of kin*": for [* 844] by the decision of *Elmsley v. Young*, upon appeal from Sir J. Leach to the Lords Commissioners (*q*), the words "*next of kin*" must be construed to mean "*nearest of kin*," to the exclusion of those who would take under the statute by representation.

Principle to be extracted from the cases.

13. We have stated that, as a general principle, the Court will execute the power among the objects *equally*; but it sometimes happens that the subject of the gift is *incapable of division*, or the settlor has expressly directed the whole to be bestowed on *one* object to be selected by the trustee. In such cases the Court still acts upon the maxim, that, if *by any possibility* the power can be executed the Court will do it.

Subject of the gift incapable of division.

In *Moseley v. Moseley* (*r*), a very early case, an estate was devised to trustees upon trust to settle on *such* (*i. e.* on *such one*) of the sons of N. as the trustees should think fit. The trustees having neglected to comply with the direction, the sons of N. filed a bill to have the benefit of the trust, and the Court decreed the trustees, within a fortnight next after the entry of the order, to nominate such one of the plaintiffs as they should think fit, upon whom to settle the lands of the testator; and if the trustees should fail to nominate within that time, or there should be any difference between them concerning such nomination, then the Court

Moseley v. Moseley.

(*o*) See *Walker v. Maunde*, 19 Ves. 427, 428.

(*p*) See *Thomas v. Hole*, Cas. t., Talb. 251; *Stamp v. Cooke*, 1 Cox, 236; *Phillips v. Garth*, 3 B. C. C. 64; *Green v. Howard*, 1 B. C. C. 33; *Raynor v. Mowbray*, 3 C. O. C. 234, Reg. Lib. B. 1891, fol. 183; *Pope v. Whitcombe*, 3 Mer. 689, Reg. Lib. B. 1809, fol. 1535; *Hinckley v. Maclarens*, 1 M. & K. 27; *Withy v. Mangles*, 4 Beav. 358; 10 Cl. & Fin. 215; *Fielden v. Ashworth*, 20 L. R. Eq. 410. The above cases are discussed in Append. No. IX. to 3d edit.

(*q*) 2 M. & K. 780; and see *Withy v. Mangles*, 4 Beav. 358; 10 Cl. & Fin. 215.

(*r*) Rep. t. Finch, 53; S. C. cited *Clarke v. Turner*, Freem. 199.

would nominate one of the plaintiffs, it being the testator's intent that his estate should not be divided, but settled upon one person.

Richardson v. Chapman. In *Richardson v. Chapman* (s), Dr. Potter, Archbishop of Canterbury, gave all his options to trustees upon trust, that in disposing thereof "regard should be had according to their discretion to his eldest son, his sons in law, his present and former chaplains, and others his domestics, particularly Dr. T., his chaplain, and Dr. H., his librarian; also to his worthy friends and acquaintance, particularly to Dr. Richardson." The trustee tried first to give the option in question to himself. He then fixed upon a person, with whom he appeared to have made an underhand bargain. When this failed, he, in breach of his duty, presented a Mr. Venner. On a bill filed to set aside the presentation, [* 845] Lord Northington * considered the trust to be of a kind that the Court could not execute, and dismissed the bill. Dr. Richardson appealed against this decision to the House of Lords, and the other person, who stood prior to him, not appearing, the House reversed the decree, and ordered the presentation to be made to the appellant. "This case," said Lord Alvanley, "shows, that however difficult it may be to select the persons intended, and though it must depend from the nature of the trust upon the opinion of the trustees as to the merit of the persons who are the objects, yet the Court will execute even a trust of that nature, if the trustee shall either neglect to execute, or be disabled from executing, or shows by his conduct any intention not to execute it as the testator intended he should. When one reads the nature of this trust, how difficult it was to make the selection, it is decisive to show the Court must do it, though the trust is in its nature so discretionary" (t).

(s) 7 B. P. C. 318; S. C. cited *Brown v. Higgs*, 5 Ves. 504, 505.

(t) *Brown v. Higgs*, 5 Ves. 504. In this case (see 4 Ves. 718, 719; 5 Ves. 508), an estate was devised "to one of the sons of Samuel Brown as John Brown should direct by a conveyance in his lifetime, or by his last will and testament;" and John Brown not having executed the power, Lord Alvanley was inclined to think, though he would not decide the point, that the children of Samuel Brown could not establish a claim; but the ground of this opinion was not that a trust had been created which the Court could not execute, but that the intention of the testator as collected from the will was to communicate a mere power.

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